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Supreme Court, U.S.
FILED

No. 97 1689 APR 13 1998

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In The
Supreme Court of the United States

October Term, 1998

AMY BLACKBURN, Individually and as Personal Representative of the Estate of **Baby Boy Doe**, Deceased

Plaintiffs and Petitioners

v.

BLUE MOUNTAIN WOMEN'S CLINIC, JOHN ROE, M.D.; JANE DOE, counselor; **MONTANA DEPARTMENT OF HEALTH AND HUMAN SERVICES**; **DIRECTOR**, of said Department of Public Health, individually and not in his official capacity, **SIDNEY PRATT, M.D.** Medical Director, Medical Advisory Unit, Montana Department of Public Health, individually and not in his official capacity; **FAMILY PLANNING CENTER OF BUTTE-SILVER BOW UNIFIED GOVERNMENT**; **TERRIE DOE, R.N.** and **JAN D., R.N.,** employees of said Family Planning Center,

Defendants and Respondents.

Petition for Writ of Certiorari
To the Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

APPEARANCES:

Robert C. Kelleher, Sr.
KELLEHER LAW OFFICE-BUTTE
Box 397
Butte, MT 59703
Attorney for Plaintiffs-Petitioners
(406) 782-7408

125 pp

QUESTIONS PRESENTED

No. 1. Where Complaint alleges public health nurses and physician gave erroneous advice to pregnant woman who thereupon gave her uninformed consent to the destruction of her 3 month old unborn, and five year medical malpractice statute of repose is "tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant", and Complaint does not allege a "separate failure to disclose", does a requirement of a "separate failure to disclose" deny the plaintiff the equal protection and due process protections of the Fourteenth Amendment?

No. 2. Where Montana case law recognizes medical malpractice wrongful death status for intrauterine death of 9 month old but denies it to 3 month old, is latter denied equal protection and due process under Fourteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI

Amy Blackburn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding on December 11, 1997 [Petition for Rehearing denied and Remittitur filed on January 15, 1998] (1) interpreting state's medical malpractice limitation statute as requiring a "separate act of deception" in uninformed consent cases and (2) granting wrongful death status for the intrauterine death of a 9 month unborn but denying such equal protection status to a 3 month unborn destroyed without plaintiff mother's consent.

OPINION BELOW

The opinion of the Montana Supreme Court that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed January 15, 1998 the Montana Supreme Court denied the petition for rehearing, App. D.

JURISDICTION

1) Does Montana Supreme Court's interpretation of "failure to disclose" provision in medical malpractice statute of limitations requiring second or separate affirmative act of concealment deny plaintiffs equal protection and due process under Fourteenth Amendment?
2) Although there is substantial consensus among tribunals of last resort including Montana allowing a cause of action for prenatal injuries to "viable" unborns if stillborn, there is a growing, persuasive minority arguing Equal Protection and Due Process Clauses require wrongful death status be accorded to prenatals regardless of gestational stage. "Blackburn also generally alleges that defendants violated

her fourteenth amendment rights." Supreme court opinion, p. 30.

The jurisdiction of the Court is invoked pursuant to 28 USC §1257(a)

STATUTE INVOLVED IN THIS CASE

§27-2-205, MCA Actions for medical malpractice states:

1. [An action for medical malpractice, whether based upon tort, contract or lack of informed consent] must...be commenced within 3 years after the date of injury or within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant, or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.
2. ...in an action for death or injury of a minor who was under the age of 4 on the date of the minor's injury, the period of limitations in subsection (1) begins to run when the minor reaches the minor's eighth birthday or dies, whichever occurs first,...

STATEMENT OF THE CASE

Plaintiff Amy Blackburn, individually and as Personal Representative of the Estate of Baby Boy Doe, brought this action in District Court in Butte on 11/29/95 for recovery of damages for the performing of an abortion on 1/20/90 without informed consent which terminated the life of Baby Boy Doe. Plaintiff alleged in her Amended Complaint that: (1) defendant public health nurses had counseled her that although she tested HIV negative, she must have an abortion (for which they arranged) or the baby and she had a 50/50 chance of dying of AIDS within two to three years; (2) when plaintiff told abortionist why she sought abortion, he, like the nurses, failed to tell her it was impossible for HIV negative mother to bear HIV positive baby, and that he would not do abortion until she took another blood test and returned with a written statement from the nurses saying she was HIV negative; (3) she again tested negative, gave the statement to the abortionist who then performed the abortion; and (4) she did not learn until March, 1995 it was impossible for a HIV negative mother to bear an HIV positive baby.

Montana's 5 year medical malpractice statute of repose provides "this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant."

All defendants filed M.R.Civ.P. Rule 12(b)(6) Motions to Dismiss.

On 6/12/96 the District Court granted the Motions with prejudice.

On appeal the Montana Supreme Court affirmed in part and reversed in part. Plaintiffs filed a timely petition for rehearing on the issues (a) did "failure to disclose" provision in statute of limitations require separate, affirmative act of concealment and (b) did granting wrongful death status for intrauterine death of nine month unborn, but denying it to three

month unborn, violate equal protection clause, which petition was denied by the lower court on 1/15/98.

QUESTION 1: **DOES MONTANA SUPREME COURT'S INTERPRETATION OF "FAILURE TO DISCLOSE" PROVISION IN §27-2-205(1), MCA REQUIRING AN ADDITIONAL, AFFIRMATIVE ACT OF CONCEALMENT BY HEALTH CARE PROVIDERS DENY PLAINTIFFS EQUAL PROTECTION AND DUE PROCESS?**

The four-justice majority said:

> Pursuant to the specific terms of the statute, we hold that a failure to disclose facts may toll the five-year statute of repose, **but only where that failure to disclose is an act separate from the alleged act of malpractice** upon which the claim for professional negligence rests. Opinion, P. 19.

Justice Nelson speaking for the three-justice minority wrote:

> Under the statutory language, tolling takes place "for *any period* during which there has been a failure to disclose." (Cite) Obviously, *"any period"* would include a failure to disclose either coincidental with or subsequent to the malpractice and, where the failure to disclose *is* the malpractice, then logically the failure to disclose cannot be an act separate from the malpractice itself.
>
> The mischief in the Court's interpretation of the statute cannot be fully appreciated until one understands that, under this construction a whole class of medical-malpractice plaintiffs has now been deprived of the protection of the tolling provisions of the statute of repose that the legislature enacted... Opn. pp 39-40

I. FIDUCIAL DUTY TO TELL TRUTH

Holding a physician has a duty to tell the truth including accurate, state-of-the-art advice, a New York appellate division affirmed as actionable erroneous advise resulting in an unnecessary abortion where the mother was HIV **positive** [Amy Blackburn was HIV negative].[1]

A physician's duty to tell the patient the truth and, conversely, not to give erroneous advice, is gospel.

> **"The patient is entitled to rely upon the physician to tell him what he needs to know about the condition of his own body. The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need in order to intelligently chart that destiny with dignity."** *Miller v. Kennedy*, 11 **Wash**. App. 272, 522 P.2d 852[2] (emph supp)

RULE: FIDUCIAL DUTY OWED TO PATIENT MEANS AFFIRMATIVE ACTS NOT NECESSARY TO PROVE FRAUDULENT CONCEALMENT

The developing history of the exceptions to the harsh "statute runs from date of error or omission" rule and so-called "affirmative act cover-up" requirement can be found in decisions of neighboring **Idaho** and **South Dakota** as well as near-neighbors **Washington**, **Utah**, **Colorado** and **New Mexico**.

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[1] *Carol Doe v. Jamaica Hospital*, 608 N.Y.S. 519 (March 7, 1994).

[2] Approved and adopted, 85 Wash.2d 151, 530 P.2d 334 (1975). Quoted in *Nixdorf v. Hicken*, 612 P.2d 348 at 354, ftnt 19.

When surgical gauze went undetected from 1946 to 1961 the **Idaho** supreme court ruled plaintiff need not allege an "affirmative act of concealment" putting emphasis on the fiduciary relationship between doctor and patient. *Billings v. Sisters of Mercy of Idaho* (1964), 389 P.2d 224 at 227

New Mexico also accepts the confidential relationship duty to speak as sufficient.

> ...fraudulent concealment ...tolls the running of a statute of limitations. *Hinkle v. Hargens*, 76 S.D. 520, 81 NW2d 888 (1957) **Normally some positive act of concealment must be shown such as a false representation. However, in a confidential relationship where there exists a duty to speak, such as in a doctor-patient relationship, mere silence constitutes fraudulent concealment.** *Guy v. Schuldt*, 236 **Ind.** 101, 138 NE2d 891 (1956). *Hardin v. Farris* (**N.M.** 1974), 530 P.2d 407 at 410 (emph supp)

Hardin was reaffirmed in *Keithley v. St. Joseph's Hosp.*, 698 P.2d 435 (**N.M.**App. 1984), which requires that unreasonable expectations cannot be placed on the unsuspecting plaintiff.

> **[2-4]** We agree with plaintiff's contention that the statute of limitations may be tolled where a physician has knowledge of facts relating to medical malpractice and fails to disclose such facts to the patient under circumstances where the patient may not be **reasonably expected** to learn of the improper acts. See *Garcia v. Presbyterian Hospital Center*, 92 **N.M.** 652, 593 P.2d 487 (Ct.App.1979);... The fraud may be **active**, because of some affirmative act to conceal information that may give the patient a cause of action, or **passive**, because of the doctor's failure to disclose material information to the patient. *Hardin*, supra; see *Leagan v. Levine*, 158 **Ga.**App. 293, 279 SE2d 741 (1981)

> Fraudulent concealment, whether active or passive, can toll the running of the statute of limitations.

> **[5]** Similarly, the statute of limitations may be tolled against a hospital. *Yamaguchi v. Queen's Medical Center,* 65 **Hawaii** 84, 648 P.2d 689 (1982). See also *Brodie v. Mastro*, 638 P.2d 800 (**Colo.**App.1981); affirmed 682 P.2d 1162 (**Colo.**1984) 698 P.2d 435, 439-440

Colorado rejected the following language found in *Adams v. Richardson*, 714 P.2d 921 (Colo.App. 1986)

> "In order for fraudulent concealment to occur, ~~the~~ **defendant**, in essence **must commit not one, but two wrongs: the original negligent act and the subsequent fraudulent concealment of the same**... 714 P.2d at 925

> ...While we recognize that the (trial) court properly applied the quoted statement from *Adams* we conclude that its statement is both dictum and inconsistent with the express language of the statutory exception...The quoted language from *Adams* would **in effect add an element to the statute that is not contained in the express language.** *Boyett v. Smith*, 888 P.2d 294 at 296 (Colo.App. 1994) Aff'd *Smith v. Boyett*, 908 P.2d 508

The fraudulent concealment doctrine without an affirmative act of concealment is available against a governmental agency.

> ...Normally, some **positive act** of concealment must be demonstrated such as a false representation by the physician or hospital. *Hardin.* However, where there exists a duty to speak as in a confidential relation, "**mere silence** constitutes fraudulent concealment." *Hardin*, 87

> **N.M.** at 146, 530 P.2d 407 (emph supp) *Armijo v. Regents of Univ. of New Mexico*, 704 P.2d 437 (N.M.App. 1984)

Twenty-eight years ago the **Washington** supreme court, after noting,

> The problem of applying the statute of limitations correctly in medical malpractice cases has been a vexing one and a continuing source of judicial uncertainty

rejected its 1954 holding (in Lindquist[3]) that,

> in cases involving allegations of foreign substances left in surgical wounds, the statute of limitations commences to run when the act occurs, i.e., at the time the foreign article is enclosed in the incision.
>
> **[5]** There is no claim here, as in some of the reported cases, that the physician did anything to **conceal** the asserted injury, or indeed knew of it, or that he in any way **misrepresented** the surgery or its results to the patient with any intent to deceive her. For cases loosely described as declaring the fraudulent concealment rule see *Guy v. Schuldt*, 236 **Ind.** 101, 138 NE2d 891 (1956); *Lakeman v. LaFrance*,102 **N.H.** 300, 156 A.2d 123 (1959) *Hinkle v. Hargens*, 76 **S.D.** 520, 81 NW2d 888 (1957)...[S]he should be accorded the right of asserting that she had no reasonable way of ascertaining that a wrong had been done her. *Ruth v. Estate of Dight*, 453 P.2d 631 (1969)

40 years ago, **South Dakota**, reasoned that

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[3]Lindquist v. Mullen, 45 Wash.2d 675, 277 P.2d 724 (1954).

[9-11] In accord with **Iowa**, and the weight of authority, fraudulent concealment of a cause of action should be recognized as an implied exception to our statute of limitations...**Mere silence, in the absence of a duty to speak, is not ordinarily sufficient. Where, however, a trust or other confidential relationship does exist between the parties, silence on the part of one having the duty to disclose, constitutes fraudulent concealment in the absence of any affirmative act.** *Hinkle v. Hargens*, 81 NW2d 888 (1957) at (890-891 (emph supp)

The **Utah** supreme court in 1980 ruled

[20-22] The trial court also erred in not submitting to the jury the plaintiff's second cause of action, concerning the doctor's **failure to disclose** the presence of the needle... This duty to inform stems from the fiduciary nature of the relationship... *Nixdorf v. Hicken*, 612 P.2d 348, 354

It quoted a D.C. Circuit opinion

"We find in the fiducial qualities of that relationship the physician's **duty to reveal to the patient** that which in his best interests it is important that he should know."[4] (emph supp)

Other early "silence is concealment" cases came from Arkansas[5], Georgia[6], Indiana[7], Kentucky and Texas[8].

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[4]*Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 (D.C. Cir. 1967). 612 P.2d at 354

[5]*Burton v. Tribble*, 70 SW2d 503 (1934) held surgeon who left gauze in patient's abdominal cavity and failed to apprise patient was guilty of continuing negligence and fraudulent concealment tolling statute.

In 1976 the **Florida** supreme court said

> ...Where an adverse condition is known to the doctor or readily available to him through efficient diagnosis, he has a duty to disclose and failure to do so amounts to a fraudulent withholding of the facts, sufficient to toll the running of the statute. *Nardone v. Reynolds*, 333 So.2d 25 at 39

In 1984 the **Alabama** supreme court continued to follow its 1940 "mere silence" decision in *Hudson, supra*. *Johnson v. McMurray*, 461 So.2d 775 at 778 (**Ala**. 1984)

II. DOES SEPARATE "AFFIRMATIVE ACT" REQUIREMENT DENY DUE PROCESS?

Where different surgeon 11 years later discovers gauze pad and plaintiff does not allege affirmative act of concealment, the **Colorado** court found

> "shocking" the contrary result reached under similar circumstances (a New York case[9])...point(ing) out..."A legal right to damage

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[6]Tabor did not allege any affirmative act of cover-up but did allege defendant "secretly withheld from her that said tube and ovary were removed by him" in 1928 which error she did not discover until 1937, filing suit in 1939. ...[t]he statute of limitations began to run from the date the plaintiff acquired knowledge of what the defendant had done." *Tabor v. Clifton*, 12 SE2d 137 (1940) at 137-139

[7] ."mere silence...results in concealment." Indiana supreme court, *Guy v. Schuldt*, 138 NE2d 891 (1956)..

[8]*Barnard v. Thompson*, 142 SW2d 238, aff'd 138 Tex 277, 158 SW2d 486 cited by 80 ALR2d 408 as supporting "silence rule".

[9]*Conklin v. Draper* (1930), 241 NYS 529, aff'd without op 254 NY 620, 173 NE 892.

for an injury is property and one can not be deprived of his property without due process. There can be no due process unless the party deprived has his day in court and if without his fault his debtor conceals from him his right until a statute deprives him of his remedy he is deprived of due process." *Rosane v. Senger* (1944) 112 Colo 363, 149 P2d 372 cited at 80 ALR2d pp. 410-411

III. DOES TOLLING *IPSO FACTO* CEASE WHEN RELATIONSHIP ENDS?

II. TERMINATION OF PHYSICIAN-PATIENT RELATIONSHIP DOES NOT NECESSARILY END FRAUDULENT CONCEALMENT[10]

Defendants do not dispute the existence of the theory of equitable estoppel for fraudulent concealment but urge the doctrine's inapplicability to these facts. The doctors assert that *Guy*[11] stands for the proposition that fraudulent concealment ceases in all cases simultaneously with the termination of the physician-patient relationship and that since they both stopped treating plaintiff no later than the end of 1963, the statute bars any action by plaintiff against either of them commenced after 1965[12]. We disagree.

In *Guy*, the plaintiff's patient-physician relationship with the defendants terminated in 1941. The plaintiff discovered defendants' alleged malpractice in 1952 and filed his complaint in 1954... The inescapable

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[10]Capitalization the court's.

[11]*Guy v. Schuldt* (1956), 236 Ind. 101, 138 NE2d 891.

[12]van Bronckhorst filed his complaint in 1973.

> implication of the Supreme Court's reversal in *Guy* is that the court there contemplated a "fraudulent concealment" which continues to toll the statute after the professional relationship terminates. *van Bronckhorst v. Taube* et al., 341 NE2d 791 at 796 (1976)

So also where after surgery orthopedist blamed a 12 year old boy's foot turning out on the way he walked. **Wisconsin** had a 5 year "statute of repose", and the patient-physician relationship had terminated 5 years and 3 months earlier. *Halverson v. Tydrich* (1990), 456 NW2d 852 at 855 and 856.

IV. DOES DUTY TO DISCLOSE CONTINUE AFTER PATIENT'S DEATH?

Nor does the patient's death appear to terminate the patient-physician relationship so as to start the running of the statute.[13]

> We find in the fiducial qualities of that relationship the **physician's duty to reveal to the patient** that which in his best interests it is important that he should know. And we would consider anomalous in this age any rule that would immunize from a similar obligation a hospital which is the repository of such knowledge.
>
> [7] This duty of disclosure, we hold, extends after the patient's death to his next of kin...[14]

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[13] In *Miller v. Romero* (W.Va. 1991) 413 SE2d 178 doctor told parents of 19 year old diabetic "it was God's will that Misty die, did not explain the problems with the diabetic medication, and paid part of the funeral bills". Court said:

> A situation where a decedent's representative is barred from filing suit against a malfeasor because that person fraudulently concealed the malpractice, and the representative did not discover the negligence until after the two-year period had run, violates the strong public policy of this State. 413 SE2d at 182

Question 2: **Where Montana case law recognizes medical malpractice wrongful death status for intrauterine death of 9 month old but denies it to 3 month old, is latter denied equal protection and due process under Fourteenth Amendment?**

Where public health nurses and abortionist, knowing mother "consented" to abortion only because they told her she and her baby would soon die of AIDS, which nurses and abortionist knew or should have known was impossible where nurses tested mother twice as HIV negative, and Baby Boy Doe was destroyed by "abortion", was he denied the Equal Protection and Due Process protection of the Fourteenth Amendment when he was destroyed without the informed consent of his mother?

Thirty-eight jurisdictions grant wrongful death status to stillborns. Killing an unborn is defined as homicide by 25 states and as criminal assault in 5 other states when resulting in stillbirth or miscarriage, and in Montana as a felony if killed after being born alive during an "abortion" 50-20-108, MCA and misdemeanor when abortion is "performed upon any woman in the absence of informed consent" or when any woman is coerced into having an abortion [50-2-106, MCA].

I. Medical Advances

A quarter of a century ago Justice Blackmun wrote in *Roe*

> ...We need not resolve the difficult question of when life begins. When those trained in the respective discipline of medicine, philosophy, and theology are unable to arrive at any consensus, **the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer**. Roe V.

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[14] *Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 at 935 (DC Cir 1967)

Wade, 410 US 159, 35 L Ed 2d 181 (emph supp). 410 US 161-162, 35 L Ed 2d 182

The Montana Supreme Court relied on the non-viability argument to justify the destruction of Baby Boy [Blackburn] Doe, admitting that at age 9 months he would have had wrongful death status because "viable" under *Strzelczyk v. Jett* (1994), 264 Mont. 153, 158, 870 P.2d 730, 733 (p. 36 of Opinion), and presumably the nurses and abortionist would have been liable. It denied Baby Boy Doe his Equal Protection Fourteenth Amendment rights based on his gestational age at the time of his destruction. This argument ignores the maxim "[n]o one can take advantage of his own wrong" 1-3-208, MCA. He was destroyed at age 3 months rather than 9 months at the erroneous inducement of the defendant nurses and abortionist.

The majority opinion also ignored current medical and biological definitions of viability. According to medical or scientific definition, an embryo or zygote is considered <u>viable</u> if it is able to undergo the complex organismal function of cellular mitosis or reproduction. In Vitro Fertilization (IVF), now a common medical or fertility clinic practice, involves the artificial fertilization of a human female gamete with that of a male resulting in a zygote. This process is accomplished in a laboratory without the presence of either of the parents from whom the gametes were obtained. The resulting zygote is considered "<u>viable</u>" if it demonstrates cellular division resulting in the formation of an embryo. With laboratory and medical scientific support, this living individual is then implanted into a woman's uterus and commonly results in continued development *in vivo* and eventually culminates in a "live-birth". At birth, as with any baby, this neonate requires intensive support for life to continue. The process from test-tube fertilization, or conception to birth, is a continuous and inseparable sequence of events, in which all of the characteristics and traits, which will distinguish this individual, are present from the moment of conception.

Viability as defined in 50-20-108, MCA (1989) "means the ability to live outside the mother's womb, albeit with artificial aid." These conditions are as clearly met by the fertilized conceptus as they are for the term or pre-term infant following parturition.

Medical and legal precedents refuse to allow the withdrawal of life supporting measures, and indeed make it unlawful to deny or withhold such procedures, to the victim of a serious head or bodily injury resulting in the temporary loss of lucidity or consciousness. This individual retains all the rights granted to him by the Constitution of the United States despite the fact that extensive artificial mechanical and biochemical measures are necessary in order to maintain said person's life. *Cruzan v. Director, Missouri Dept. of Health,* 497 US 261,111 L Ed 2d 224, 119 S Ct 2841 (1990) Allowed the proper medical care, there is likelihood that this individual might make a full and complete recovery. From a social standpoint it would be unconscionable to discontinue the support of such a comatose individual before a determination could be made as to the probability of his recovery. In fact, he may follow one of four courses: (1) Full Recovery, (2) No Recovery or Change, (3) Death by Cessation of Cardiac or Brain Function, (4) Partial Recovery. Hence, while in a comatose state this person maintains only the potential for progression to a state no longer requiring artificial maintenance. This individual's status is precisely the same as that of the unbirthed infant from the very moment of his/her conception.

The concept of IVF raises another question surrounding the degree of maintenance and the necessity of such intervention of an artificial nature which is required to support the embryo prior to it's implantation in the womb.

Many diabetic and asthmatic individuals would rapidly succumb were they not medically and more specifically biochemically maintained on a daily and even hourly basis. These persons are still considered viable outside the mother's womb. Their situation differs not at all from the fully viable conceptus, produced outside the mother and capable of growth

and development, albeit with external support. By the Montana Court's own definition, the fertilized ovum at the time of conception is proven through the practice of IVF to be able to survive outside the mother's womb prior to implantation and would therefore meet the court's definition of viability. This must be a biological and not a sociological definition. Maternal and paternal gametes contain the genetic material and exist in what is known as a haploid state. That is, each contains exactly twenty-three chromosomes of the forty-six required for the human species. Upon fertilization or in other words, **at conception, these gametes combine to form a new and unique individual, never before seen on this earth and one which can never be exactly duplicated in the process of reproduction**. A final determination of the viability is the individuality of the person. Each person is considered a separate individual under the law and as such is entitled to full protection and is heir to certain rights.

DNA testing, which has now become commonplace in the courts, proves the uniqueness of each individual's genetic makeup. The Court is requested under Montana Rule of Evidence 201(d) to take judicial notice of this extract found at page 54 of *ABC of Clinical Genetics*, 2nd Ed. (1994) by Helen M. Kingston, Consultant Clinical Geneticist, St. Mary's Hospital, Manchester, printed in Great Britain by Eyre & Spottiswoode Ltd., London:

> The enormous variation occurring in non-coding DNA among different subjects is illustrated particularly well in certain hypervariable minisatellite regions throughout the genome that share a short common core sequence in their variable number of tandem repeats (VNTRs). These hypervariable minisatellite regions are stably inherited and give a pattern of DNA fragments of various sizes on analysis that is ***unique to each person, forming the basis of the DNA fingerprinting test.***

The Court is also requested to judicially notice under M.R.Evid. 202(b)(3) the following:

> (4) "DNA record" means DNA identification information stored in the DNA identification index for purposes of establishing identification in connection with law enforcement investigations or supporting statistical interpretation of the results of DNA analysis. The DNA record is considered the objective form of the results of a DNA analysis, such as the numerical representation of DNA fragment lengths, autoradiographs and the digital image of autoradiographs, and discrete allele assignment numbers.
> (5) "DNA testing," means DNA analysis of materials derived from the human body for the purposes of identification consistent with this part. 44-6-101, MCA

At the moment of conception, an unborn individual or person is created with its own DNA, a new and unique life with the potential for growth and independent existence not differing in any way from a person on life support or even one requiring medical or biochemical manipulation of their internal or external environment to insure their survival.

A. "Individuality" the Benchmark - Not Viability

After tracing the history from Justice Holmes' 1884 decision that the fetus *en ventre sa mere* had "no juridical existence" but was "an integral part of its mother" (*Dietrich v. Inhabitants of Northampton,* 138 Mass. 14, 52 Am.R. 242), through the dissent of Illinois Justice Boggs in 1900 that a viable child can have a cause of action if subsequently born alive (*Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N.E. 638), Rhode Island's high court found "many courts" in rejecting "Holmes' original pronouncement" have relied "on the proposition, attributed to the civil law, that from the moment of conception a separate organism with its own identity comes into existence."

> ...The myth, perpetuated by Mr. Justice Holmes in 1884, that the unborn fetus is but a part of its

mother's body, has long since been laid to rest in both law and medicine.

While we subscribe to the view of the above-mentioned authorities regarding liability of the tortfeasor in a case like this one, we must, consistently with our previous decision in *Sylvia v. Gobeille,* 101 R.I. at 80, 220 A.2d at 224 diverge from their view, consistently with the significance of viability. ***In Sylvia, we were unable logically to conclude that a claim for any injury inflicted prior to viability is any less meritorious than one sustained after. Similarly, in the present instance, logic does not permit the insistence on viability as the line of demarcation between those for whom an action will lie and those who are without rights under the statute.***

Simple precepts of logic have carried this small area of law to a point far removed from the position adopted by Mr. Justice Holmes. The momentum of that logic together with our previous holding in *Sylvia* carry us now to the ***inescapable conclusion that viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities.*** It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur. (Presley v. Newport Hospital,* 365 A.2d 748, 753-754 (1976). (emph supp)

In 1986 Texas joined a then majority of 33 other jurisdictions holding parents had a right of recovery for intrauterine death of a viable unborn and for "prenatal injury to a nonviable (unborn)...if born alive and survives." *Lobdell v. Tarrant County Hospital,* 710 SW2d 811 at 813. The court said the legislature in setting a penalty "from five years to life for anyone who destroys the life in a child...before actual birth shows that the Legislature *does* recognize the unborn as a person." *Id.* 813 In reply to Justice Blackmun's "opinion that an unborn child has only the potentiality of life" *Roe v. Wade*, 410 US at 1162, 93 S.Ct at 731 "we find...the Texas Legislature recognizes that the unborn child has 'vitality' or 'life', and not just the potential for life... 710 SW2d at 813

After the two judge majority admitted in *City of St. Louis v. Klocker,* 637 S.W.2d 174 (Mo.App. 1982), an abortuary trespass case, "[n]ecessity is a defense long-recognized by the common law as a type of justification defense" 637 S.W.2d 175, dissenting Judge Pudlowski, after citing *Polk County et al. v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 409 (Blackmun dissenting) in favor of admitting evidence in support of the necessity defense, wrote

> Numerous and extensive studies (New Engl. Jr. of Med. 1189 (1974), and other treatises) have indicated that human life begins at the moment of conception. The Supreme Court...in *Roe v. Wade* (cite) refused to address "the difficult question" despite the scientific view that life commences at that moment.

In *Witty v. American Gen. Capital Dist., Inc.,* 727 S.W. 2d 503 (Tex. 1987), relying on Florida and California decisions, Texas refused to accord that right where the child was not born alive. Justice Kilgarlin, joined by Chief Justice Hill and Justice Ray dissented.

> ...Now, we consign ourselves to the dark ages of tort law and will again merit the dubious distinction of being one of the last states, if ever, to accept a cause of action already

recognized in thirty-six jurisdictions: a wrongful death action for the death of a fetus at the hands of a negligent tortfeasor. (I might point out the ratio is actually 4 1/2 to 1, not simply "better than two to one," as the court suggests).

It is more than arguable that the common law did not limit rights of fetuses to those born alive. Sir William Blackstone, writing at about the time of the American Revolution "Of the Rights of Persons", said:

Life...begins in contemplation of law a[s] soon as an infant is able to stir in the mother's womb. For if a woman is quick with child...[and] if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this though not murder, was by the antient law homicide or manslaughter. 727 S.W. 2d at 508

1 W. Blackstone, *Commentaries* *129

...It is difficult to fathom how "something" which could be the victim of a homicide or manslaughter is not a person at common law. It likewise defies comprehension how "something" which could be recognized as the object of legal estates or have a guardian could not be a person in the eyes of the common law...

The Nelson court relied on several landmark English cases for authority. One, *Thelluson v. Woodford*, 4 Ves.Jr. 227, 31 Eng.Rep. 117 (ch. 1798), was a monumental opinion, which, including a recitation of counsel's argument, was over one hundred pages in length. Sitting by special invitation of Lord Chancellor Loughborough, Sir Francis Buller, formerly a justice of the Court of King's

Bench but by 1798 a judge of the Court of Common Pleas, responded to the contention that an infant in ventre sa mere was a non-entity...

Lord Chancellor Hardwicke, speaking in *Wallis v. Hodson*, 2 Atk. 114, 117, 26 Eng.Rep. 472, 473 (Ch. 1740), said that an infant in ventre sa mere was a person in rerum natura (in the nature of things) "so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's life time."

Justice Edwin Hobby concluded his Nelson analysis of the common law with what is equally a most persuasive statement as relates to this case. He quoted from *Doe v. Lancashire*, 5 Durn. & East R. 49, 61, 101 Eng.Rep. 28, 36, (K.B. 1792), where the Court of King's Bench, through Justice Buller, said: "[t]here is no distinction between a child in ventre sa mere and one actually born," an opinion joined in by his colleague, Justice Grose... [727 S.W. 2d at 509]

Currently, thirty-five states and the District of Columbia allow wrongful death actions to be brought on behalf of stillborn, viable fetuses. Only eight states do not yet allow this type of recovery. The remaining jurisdictions have not passed on the question. With its decision, the court has joined a distinct minority of jurisdictions, which cling to an anachronistic requirement that has its genesis in 1884. Ironically, while this court concedes that a fetus has an existence separate from its mother, the basis of the Dietrich holding was that no recovery could be allowed because the

fetus was merely a part of the mother's body. 138 Mass. at 17.

> "The entire history of the development of tort law shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all." Restatement (Second) of Torts 1 comment e (1965).... I would hold that under our Wrongful Death Act, parents are entitled to assert a cause of action for death of the unborn. HILL, C.J., and RAY, J., join in this dissenting opinion. [727 S.W. 2d at 512].

Langford v. Blackman, 790 S.W. 2d 127 (Tex. App-Beaumont 1990) held a viable unborn, killed through negligence, is a "person" and he and his parents have suffered tortious wrong under the Wrongful Death Act and Survival Act, quoting from *Sanchez v.Schindler, 651 S. W. 2d. 249 (1983)*

> *[t]he real loss sustained by a parent is not the loss of any financial benefit to be gained from the child, but is the loss of love, advice, comfort, companionship and society.* (emph the court's).

In April, 1997, citing *Witty* (727 S.W.2d 503, 504) and the common law the Texas court held that "the Texas Wrongful Death Act precludes recovery of the loss of a fetus when there is no live birth" *Id.* 504 Seven justices held a mother has a cause of action for negligent infliction of mental anguish for stillbirth because "a woman can recover mental anguish damages resulting from negligent treatment that causes the loss of a fetus *as part* of the woman's body" (emph the court's) but not as bystander to medical malpractice. Dissenting Justice Gonzalez cites 38 jurisdictions granting wrongful death status to stillborns to which the majority, deferring to the legislature, replied 33 were by statute. *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76, 86-88

Typical of the statutes in 28 other states[15] is that of Ohio.

> (B) No person shall cause the death of another or the *unlawful termination of another's pregnancy* as a proximate result of the offender's committing or attempting to commit a misdemeanor of the 1st, 2nd, 3rd, or 4th degree...
>
> Whoever violates this section is guilty of involuntary manslaughter...(Ohio Revised Code 2903.04)

B. WHAT DOES VIABLE MEAN?

What human can survive without other humans? We depend on farmers for our food, builders for our shelter and weavers for our clothing.

Humans can survive only in a limited environment – within a narrow range of temperature, altitude, atmosphere and gravity. The unborn live in a fluid - something none of us could do. We can not live in the ocean like dolphins or in the air like eagles or in space or even on the moon. Does this mean we are not viable?

What toddler could survive on its own? Are not the quadriplegic, the geriatric and mentally handicapped all dependent on others for their survival? Can we say, then, that

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15 Ten states by statute define killing an unborn child as a form of homicide regardless of the stage of pregnancy; Arizona, Illinois, Indiana, Louisiana, Minnesota, Missouri, North Dakota, Ohio, South Dakota and Utah. California defines by statute the killing of an unborn child after the embryonic stage as a form of homicide. Eight states define by statute the killing of an unborn after quickening as homicide: Florida, Georgia, Michigan, Mississippi, Nevada, Oklahoma. Washington and Wisconsin. Five states by statute or case law define killing of an unborn after viability as homicide: Iowa, Mass., South Carolina, Tenn., and Rhode Island. New York defines killing of an unborn after the 24th week of pregnancy as homicide. Five states define by statute as criminal assaults attacks on pregnant women causing miscarriage or stillbirth: Arkansas, Iowa, Kansas, New Mexico and Wyoming. Five states define by statute nonfatal attacks on an unborn child as criminal offenses: Illinois, Louisiana, Minnesota, North Dakota and South Dakota. Courtesy of prosecuting attorney's office, Cincinnati, Ohio.

they are not human and therefore not entitled to human rights? Can we "pull the plug" on a patient on life support systems without his or her consent because the patient is not viable? In *Cruzan v. Director of Missouri Dept. of Health,* 497 US 261, 111 L Ed 2d 224, 112 S Ct 2791 (1992) this Court insisted on substantial proof such was the wish of the comatose patient. The "not human" or not a "person" argument is nothing new. It has been leveled against blacks, Jews, Gays, women,[16] Native Americans, Irish and even the poor to justify the unjustifiable.

In 1990 dissenting Justice Holstein in *Rambo v. Lawson,* 799 S.W.2d 62 wrote,

> The viability standard, relied on by two members of the majority as the time when a fatal injury to a fetus gives rise to a wrongful death action, is arbitrary, unworkable and the outgrowth of a fundamental misunderstanding of generally acceptable scientific facts. Viability should be rejected as a standard for determining whether a fetus is a "person" in the context of our wrongful death statute.
>
> The concept of viability was invented by Justice Boggs of the Illinois Supreme Court in an effort to avoid the harshness of Holmes' rule in *Dietrich.* The Illinois Supreme Court, relying on *Dietrich,* refused to allow an action for prenatal injuries. *Allaire v. St. Luke's Hosp.,* 184 Ill. 359, 56 N.E. 638 (1900). The majority relied on Holmes' notion that a child is a part of the mother's body. Boggs attacked that tenuous rationale:

---

16 Thomas Aquinas, who could not read Greek, reportedly learned of Aristotle through a Latin translation by an Arabian philosopher who believed women possessed only half a soul. Fr. Malachy, O. Carm, Carmelite House, Niagara Falls, Ont. says Aquinus believed women were "misbegotten males conceived when the south wind was blowing." [Islamic theologians today do not teach that women have half a soul. Rev. Fenton, O.P., Dominican House of Studies, Wash. D.C.]

> A fetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation. Medical science and skill have demonstrated that at a period of gestation in advance of the period of parturition, the fetus is capable of independent and separate life. 56 N.E. at 641.

The viability standard for determining when a wrongful death action arises for prenatal injury was first addressed by Missouri courts in *Seggall v. Morris*, 363 Mo. 1224, 253 S.W.2d 577 (1953)...There, the mother was pregnant with a viable infant and was involved in a vehicle accident. This court, after citing the growing body of case law, which rejected the *Dietrich* rule, stated:

> [I]t is not in accordance with the truth to say the law indulges a fiction when it attributes a legal personality to an unborn child...A number of courts and text writers have reached the same conclusion. We call particular attention to the opinion by Justice McGuire in the case of *Bonbrest v. Kotz, supra,* 65 F.Supp. *loc. cit.* 140(3). The justice there cited many medical authorities to support the statement, "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception--which is in fact."

Professor Prosser has summarized the problems with utilizing viability:

> [M]edical authority has long since recognized that an unborn child is in existence from the moment of conception, and for many purposes, its existence is recognized by law...
>
> [L]ogic is in favor of ignoring the stage at which injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary development requirements altogether.
>
> *Prosser and Keeton on the Laws of Tort,* 555, 367-68 (W. Keeton, D. Dobbs, R. Keeton, and D. Owen 5th ed. 1984). (799 S.W.2d at 66-68)

The **Missouri** Supreme Court abrogated *Rambo,* supra, in 1995 in *Connor v. Monkem Co. Inc.*, 898 S.W.2d 89 citing Judge Holstein's dissent.

> Rules of statutory construction should never be applied so as to defeat the purpose of the statute. The viability standard is not the plain language of the statute; it is not consistent with the common law; it is incongruous with reason. 799 S.W.2d at 71... we cannot avoid the conclusion that the legislature intended the courts to interpret "person" within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her child, *even prior to viability.* (898 S.W.2d 90-91) (emph supp)

Over 10 years ago, **Pennsylvania** agreed that life begins at conception, rejecting viability as an "arbitrary period of gestation" in *Amadio v. Levin,* 501 A.2d 1085 (Pa.1985).

In 1989, **Michigan's** Court of Appeals rejected the nonviable argument in a one paragraph decision in *Fryover v. Forbes,* 176 Mich.App. 36, 439 N.W.2d 284 (1989).

> Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) as to plaintiff's wrongful death suit regarding Karl, claiming that a nonviable fetus is not a person under the wrongful death act. The trial court granted defendant's motion relying on this Court's decision in *Toth v. Goree,* 65 Mich.App. 296, 237 N.W.2d 297 (1975) lv. den., 396 Mich. 836 (1976). We agree with Judge Mather's dissent in *Toth* and, therefore, reverse the trial court's decision. See also *Presley v. Newport Hospital,* 117 R.I. 177, 365 A.2d 748 (1976).
> Reversed and remanded for further proceedings. (439 N.W.2d 284).

A 7.3 weeks old unborn who died of salmonella poisoning was a "person" under **South Dakota's** Wrongful Death Act according to *Wiersma v. Maple Leaf Farms,* 543 N.W.2d 787 (S.D. 1996): HDNT 10. Death. Legislature's intent, in using term "unborn child" to expand class of persons for whose loss a wrongful death action could be maintained, was to encompass nonviable as well as viable children still within the mother's womb. SDCL 21-5-1

C. VIABILITY AN INVALID TEST

Having become current in the disciplines of medicine and common law, it is time to revisit the non-issue of viability.

The word of the Lord came to me thus: Before I formed you in the womb I knew you. Before you were born I dedicated you. Jeremiah, Chapter 1.

Not considered by the lower court were Montana's abortion consent statutes.

> 50-2-104, MCA (1989)(3)
> "Informed consent" means voluntary consent to an abortion by the woman only after...*full disclosure* to her by the physician who is able to perform the abortion...of (b) the physical and psychological effects of abortion, and available alternatives to abortion, including childbirth and adoption.
>
> 50-20-106, MCA (1989)
> (1) No abortion may be performed upon any woman in the absence of informed consent...
> (4) No public employee of the state or of any local governmental body shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.
> (5) Violation of subsections (1) and (4) of this section is a misdemeanor.

It is true Baby Boy Doe was destroyed, or his life terminated, by a means described as an 'abortion'. However, an 'abortion' of an unborn regardless of gestational age is legal only with the mother's consent.

Just as the Court has kept abreast of the times in *Washington v. Glucksberg,* 138 L Ed 2d 772 (1997) by rejecting the Kevorkian arguments of the plaintiff's by protecting the sanctity of human life at its end, has the time now come to protect life at its beginning? in *Glucksberg* the Court accepted the Ninth Circuit panel's findings that "[I]n the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction." 49 F.3d 586, 591 (1995).

II. INDIVIDUALITY THE TRUE TEST

The individuality of each "person" is fundamental to any claim to "human rights".

The individuality or uniqueness of each individual is consequently a determining factor in any action regarding the

denial of rights or due process. The separateness or unique characteristics of each individual are, however, chiefly a biological function and to understand the diversity of individuals, one must examine the biochemical differences and how these are expressed to culminate in a "Person".

The template for human life, and indeed all life as we know it, is the basic chromosome. The single most important common factor in living organisms is the presence of chromosomes. The chromosome, to accurately simplify the science, is a blue print or code from which the entire organism is constructed. Contained within chromosomes, the actual information that will eventually be translated into individual characteristics, and subsequently into an organism, is a simple four character code, variable in sequence and sequence length as well as proximity, which results in an ability to encode an infinite number of variations. Alterations in a single letter of the code, or nucleotide, may be sufficient to alter the entire individual and even determine its survival.

DNA testing as used in modern [44-6-101, MCA] forensics is considered to be accurate to the degree that it can isolate a single individual within billions of such beings. This process, is, however, limited to the relative chemical composition of a tested sample and does not even take into account the sequencing of the material.

Based upon these known facts and without any unsupported conclusions, it becomes apparent that at the moment of conception, when the male gamete is combined with the female gamete, an **individual** has been created which is new and unique to this planet, and although not yet expressed through development, contains all of the information it will ever have that will determine not only its final characteristics, but also its potential.

REASONS FOR GRANTING WRIT

1. The interpretation of the "failure to disclose" provision in Montana's 5 year medical malpractice statute of repose by the Montana Supreme Court requiring second or separate affirmative act of concealment by health care providers denies Petitioners equal protection and due process under the Fourteenth Amendment.

2. Where Montana case law recognizes medical malpractice wrongful death status for intrauterine death of 9 month old but denies it to 3 month old, latter is denied equal protection and due process under Fourteenth Amendment.

3. Because Baby Boy Doe was a "person" at the time he was destroyed without his mother's consent, and because Montana recognizes a cause of action for the intrauterine death of a 9 month unborn *Strzelczyk v. Jett* , *supra* Baby Boy Doe has been denied the Equal Protection Clause of the Fourteenth Amendment.

4. Although there is substantial consensus among tribunals of last resort including Montana allowing a cause of action for prenatal injuries to "viable" unborns if stillborn, there is a growing, persuasive minority arguing Equal Protection and Due Process Clauses require wrongful death status be accorded to prenatals regardless of gestational stage.

5. Whether the Butte Family Planning nurses were negligent or even reckless is a jury question. Whether they should have known it was impossible for an HIV negative mother to have an HIV positive baby is a jury question. Whether the abortionist at Blue Mountain in Missoula knew, or in the exercise of reasonable care should have known, it was impossible for the baby to be HIV positive is a jury question.

Respectfully submitted this 25th day of March 1998.

Robert C. Kelleher

Robert C. Kelleher, Sr.
Box 397
Butte, MT 59703
(406) 782-7408

APPENDIX A

In re: AMY BLACKBURN, Individually, and as Personal Representative of the Estate of Baby Boy Doe, Deceased,

Plaintiff and Appellant,

v.

BLUE MOUNTAIN WOMEN'S CLINIC; JOHN ROE, M.D.; JANE DOE, Counselor, MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; DIRECTOR of said Department of Public Health, Individually, and not in his official capacity; SIDNEY PRATT, M.D., Medical Director, Medical Advisory Unit, Montana Department of Public Health, individually and not in his official capacity; FAMILY PLANNING CENTER OF BUTTE-SILVER BOW UNIFIED GOVERNMENT; TERRI DOE, R.N., and JAN D., R.N., employees of said Family Planning Center,

Defendants and Respondents.

No. 96-408

IN THE SUPREME COURT OF THE STATE OF MONTANA

APPEAL FROM:

District Court of the Second Judicial District,
In and for the County of Silver Bow,
The Honorable James E. Purcell, Judge presiding.
COUNSEL OF RECORD:

For Appellant:

Robert C. Kelleher, Sr. (argued), Attorney at Law, Butte, Montana

For Respondents:

Cynthia K. Smith (argued); Cederberg, Shott & Smith, P.C.;
Missoula, Montana (for Blue Mountain Clinic)

John P. Davis and Tina L. Morin (argued); Poore, Roth & Robinson, P.C.; Butte, Montana (for Butte-Silver Bow County
Health Department and Jan Cossel, R.N.)
Thomas G. Bowe; Assistant Attorney General; Agency Legal
Services Bureau; Helena, Montana (for Department of Public
Health & Human Services and Sidney Pratt, M.D.)

For Amici Curiae:

Michael G. Eiselein (argued); Lynaugh, Fitzgerald & Eiselein;
Billings, Montana (for Montana Trial Lawyers Association)

Richard F. Cebull (argued) and Lisa A. Rodeghiero (argued);

Brown, Gerbase, Cebull, Fulton, Harman & Ross; Billings, Montana (for Montana Defense Trial Lawyers Association)

Michael F. McMahon; Harrison, Loendorf, Poston & Duncan;
Helena, Montana (for Montana Medical Association)

Argued: August 12, 1997

Submitted: November 13, 1997

Decided: December 11, 1997
Filed:_____
Clerk of Court

Justice Jim Regnier delivered the opinion of the Court.

In November 1995, plaintiff and appellant Amy Blackburn filed an action in the Second Judicial District Court, Silver Bow County, against the named defendants to recover damages she alleges in connection with an abortion she underwent at the Blue Mountain Clinic in Missoula on January 20, 1990. Defendants subsequently moved to dismiss Blackburn's first amended complaint on the basis that each of Blackburn's claims is barred by the applicable statute of limitations, and that certain claims must fail as a matter of law. In an order dated June 12, 1996, the court granted defendants' respective motions to dismiss. It is from that order that Blackburn now appeals. For the reasons discussed below, we affirm in part and reverse in part.

We find the following issues dispositive on appeal:

1. Did the District Court err in concluding the applicable statute of limitations barred Blackburn's claim for negligence and medical malpractice?

2. Did the District Court err in concluding the applicable statute of limitations barred Blackburn's claims for assault and battery?

3. Did the District Court err in concluding that Blackburn's 42 U.S.C. §1983 civil rights claim is barred by the applicable statute of limitations and fails as a matter of law?

4. Did the District Court err in dismissing Blackburn's claims brought on behalf of her aborted fetus?

FACTUAL BACKGROUND

Blackburn filed her original complaint in this matter on November 29, 1995. On December 29, 1995, Blackburn filed her first amended complaint. It is from Blackburn's amended complaint that this Court takes as true the following allegations of fact.

Blackburn became pregnant in 1989 and learned soon thereafter that the father was HIV positive. Blackburn subsequently tested negative for HIV. Jan Cossel is a registered nurse employed by the City and County of Butte-Silver Bow who administered Blackburn's HIV test. In so doing, Cossel allegedly advised Blackburn that, despite her HIV negative status, she would die within a few years and that her baby had a 50 percent chance of being born HIV positive and would likely die within two years. Cossel and another nurse allegedly urged Blackburn to have an abortion and made an appointment for her at the Blue Mountain Clinic in Missoula.

When Blackburn arrived at the Blue Mountain Clinic for her abortion, she informed a counselor at the clinic that she had tested negative for HIV, but that the father had tested positive. The counselor told Blackburn that, prior to proceeding with the abortion, Blue Mountain

would require written proof of Blackburn's HIV-negative status. Cossel provided Blackburn with the requisite written statement, which Blackburn in turn gave to the clinic counselor.

Prior to the procedure, Blackburn told the Blue Mountain Clinic counselor that she was seeking an abortion only because she feared her baby would be born HIV positive. Blackburn claims neither the counselor, nor any nurse or doctor with whom Blackburn spoke to any time prior to her abortion, explained to Blackburn that an HIV negative mother could not deliver an HIV positive baby. In addition, Blackburn alleges, no one discussed with her any of the risks associated with the abortion procedure.

Accordingly, on January 20, 1990, Blackburn underwent an abortion at the Blue Mountain Clinic. Blackburn was discharged from the clinic soon after the procedure, but she experienced continued bleeding and cramping in the days following. Two days after the abortion, Blackburn called the Blue Mountain Clinic and spoke with the counselor who had advised her prior to the abortion and who now assured Blackburn her bleeding would stop and called in a prescription for her. On January 24, 1990, Blackburn twice visited the emergency room at St. James Hospital in Butte with complaints of continued bleeding and cramping. On January 25, 1990, Blackburn returned to the Blue Mountain Clinic and was examined by the same counselor, who advised Blackburn her condition was normal and provided her with another prescription.

Blackburn became depressed following the abortion and entered counseling in 1990. In March 1990, Blackburn was hospitalized for more than two weeks due to an emotional

condition which resulted from the abortion. In 1993, Blackburn's counselor referred her to Dr. Richard Moore, who determined she had been suffering from anxiety and depression and prescribed anti-depressants which Blackburn continues to take. Blackburn alleges that she is now dependent upon anti-depressants, and suffers from claustrophobia, agoraphobia, anxiety and depression.

Blackburn first consulted with an attorney in March 1995, at which point she learned that an HIV negative mother cannot give birth to an HIV positive baby. Blackburn contends that it was not until she realized her baby would not have been born with HIV that she first learned she had been legally injured and had a cause of action. Accordingly, on November 29, 1995, Blackburn filed suit in her own name, as well as on behalf of the unborn fetus, against the named defendants in this case. Blackburn's first amended complaint, filed on December 29, 1995, alleges claims for negligence, medical negligence, assault and battery, and civil rights violations against various defendants.

On December 19, 1995, Blue Mountain Clinic, Inc., incorrectly identified in Blackburn's complaint as the Blue Mountain Women's Clinic, filed a motion to dismiss the complaint in this case pursuant to Rule 12(b)(6), M.R.Civ.P. In her complaint, Blackburn uses the fictitious name of John Roe, M.D., to identify as an additional defendant the physician who performed the abortion, and the fictitious name of Jane Doe, to identify the counselor at the Blue Mountain Clinic with whom Blackburn had repeated contact. Blackburn has not further identified or served either of these fictitiously named defendants, instead apparently alleging the Blue Mountain Clinic is vicariously liable for their conduct pursuant to the theory of *respondeat superior*. Accordingly, Blue Mountain Clinic

moved to dismiss Blackburn's complaint insofar as the allegations contained within it additionally pertained to the doctor and counselor.

On December 21, 1995, Butte-Silver Bow County Health Department (BSB Health Department), incorrectly identified in Blackburn's complaint as the Family Planning Center of Butte-Silver Bow Unified Government, and Cossel, incorrectly identified by the complaint and Jan D., filed a similar motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P. In her complaint, Blackburn also names as a defendant Terri Doe, R.N., the second nurse employed by the City and County of Butte-Silver Bow who allegedly advised Blackburn to obtain an abortion and helped make arrangements at the Blue Mountain Clinic in Missoula. Blackburn did not subsequently identify or serve Terri Doe, whose true identity remains unknown. As she does with respect to Blue Mountain, Blackburn apparently alleges vicarious liability on the part of the BSB Health Department for the conduct of its employees

On December 22, 1995, Sidney Pratt, M.D., filed a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P., and on December 28, 1995, the Department of Public Health and Human Services (DPHHS) filed a similar motion to dismiss. Blackburn also lists the apparently deceased director of DPHHS as defendant, but does not identify him by name.

On December 29, 1995, Blackburn filed her first amended complaint. Defendants Blue Mountain Clinic, DPHHS, Dr. Pratt, BSB Health Department, and Cossel similarly moved to dismiss Blackburn's amended complaint. On June 12, 1996, the District Court issued an order granting defendants' respective motions to dismiss Blackburn's complaint in its entirety. It is from that order that Blackburn now appeals.

DISCUSSION

We review *de novo* a district court's ruling on a motion to dismiss under Rule 12(b)(6), M.R.Civ.P. *Gerber v. Commissioner of Ins. of State of Montana* (1990), 242 Mont. 369, 370, 786 P.2d. 1199, 1200 (citing *Koppen v. Board of Medical Examiners* (1988), 233

Mont. 214, 217, 759 P.2d 173, 175). This Court reviews an appeal from a district court's order granting a motion to dismiss based on the sufficiency of the complaint. *Busch v. Kammerer* (1982), 200 Mont. 130, 132, 649 P.2d 1339, 1340 (citing *Conley v. Gibson* (1957), 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed. 2d 80, 84).

> In *Wilson v. Taylor* (1981), 194 Mont. 123, 634 P.2d 1180, we recognized that
> [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.

Wilson, 194 Mont. at 126, 634 P.2d at 1182 (citations omitted).

Thus, "[i]n reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff and take the allegations of the complaint as true." *HKM Associates v. Northwest Pipe Fittings, Inc.*(1995), 272 Mont. 187, 191, 900 P.2d 302, 304-05 (quoting *Goodman Realty, Inc. v. Monson* (1994), 267 Mont. 228, 231, 883 P.2d 121, 123).

Pursuant to this standard of review, this Court will affirm the court's dismissal only if we "determine that plaintiff is not entitled to relief under any set of facts which could be proven in support of the claim." *Grove v. Montana Army Nat'l Guard* (1994), 264 Mont. 498, 501, 872 P.2d 791, 793, (citing *King v. State* (1993), 259 Mont. 393, 396, 856 P.2d 954, 955).

The District Court's determination that Blackburn's complaint failed to state a claim is a conclusion of law. *See Boreen v. Christensen* (1994), 267 Mont. 405, 408, 884 P.2d 761, 762. This Court's standard of review of a district court's conclusion of law is whether the court's interpretation of the law is correct. *Boreen,* 267 Mont. at 408, 884 P.2d at 762 (citing *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601, 603).

ISSUE 1

Did the District Court err in concluding the applicable statute of limitations barred Blackburn's claims for negligence and medical malpractice?

In her amended complaint, Blackburn levels allegations of negligence and medical negligence against various defendants. Blackburn contends the Blue Mountain Clinic, by virtue of physician John Roe's and counselor Jane Doe's conduct, negligently advised and treated Blackburn prior to, during, and after her abortion.

Blackburn additionally alleges liability on the part of the BSB Health Department for the conduct of two of the registered nurses it employs. Specifically, Blackburn contends that Cossel and another nurse acted negligently when they urged Blackburn to seek an abortion and provide her with inaccurate medical information upon which she relied in making the decision to abort her fetus. Finally, Blackburn alleges Dr. Pratt and DPHHS were negligent in their failure to properly supervise the BSB Health Department.

In their respective motions to dismiss, defendants contend that each of Blackburn's claims for either general or medical negligence is barred by the applicable statute of limitations. The District Court agreed, and in its June 12, 1996, order held that Blackburn's claims for negligence and medical malpractice were barred by the applicable time limitations codified at §27-2-204 and -205, MCA, respectively. We review the District Court's conclusion on this issue to determine whether it is a correction application of the law.

Accrual

Pursuant to §27-2-101(2), MCA, unless otherwise provided by statute, the period of limitation applicable to any given cause of action begins to run "when the claim or cause of action accrues." Section §27-2-102(1), MCA, explains accrual as follows:

> For the purposes of statutes relating to the time within which an action must be commenced:
>
> (a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to

> maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;
>
> (b) an action is commenced when the complaint is filed.

Here, Blackburn argues that her cause of action did not accrue until her 1995 consultation with an attorney during which she finally learned that an HIV negative mother cannot give birth to an HIV positive baby. It was upon this revelation, Blackburn maintains, that she first learned that she had been "legally injured" and had a cause of action. Alternatively, Blackburn argues her claim accrued no earlier than November 1993 when Dr. Moore first diagnosed her with severe depression and she discovered the extent of her damages.

Without exception, defendants argue that Blackburn's cause of action accrued, not in 1995 when she alleges she first became aware she had a cause of action, but by the time of her abortion on January 20, 1990. Defendants contend the elements of Blackburn's claims for negligence and medical negligence were all present by that time, and that her failure to understand the full extent of her damages until 1993 does not prove her cause of action from accruing.

Blackburn alleges that the Blue Mountain Clinic and BSB Health Department defendants each had a duty to provide competent medical care, to impart accurate medical information regarding the transmission of HIV, and to inform her of the risks associated with abortion. Blackburn also alleges that Dr. Pratt and DPHHS had a duty to properly supervise the BSB Health Department defendants. Blackburn contends the defendants

breached their respective duties, which in turn caused Blackburn emotional injury.

Section §27-2-102(2), MCA, expressly provides that "[l]ack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitations." The elements constituting Blackburn's claims for negligence and medical malpractice were present at the time of her abortion in January 1990, or, at the latest, in March of that year when emotional problems stemming from the abortion led to Blackburn's hospitalization.

Blackburn argues the damages element of her negligence-based claims was not present in 1990, and that her cause of action accrued at the earliest in 1993 when Dr. Moore first diagnosed her with depression. This Court has previously held, however, that "it is not necessary to know the total extent of damages that an act causes to begin the running of the statute of limitation." *See, e.g., E.W. v. D.C.H.* (1988), 231 Mont. 481, 487, 754 P.2d 817, 820-21).

Blackburn's alleged damages, including the loss of her unborn fetus as well as ensuing emotional difficulties, were manifest at the time of the abortion procedure or shortly thereafter. Indeed, Blackburn sought counseling for her emotional difficulties, including depression, within weeks of the abortion. That a physician did not formally diagnose Blackburn with severe depression until 1993 is insufficient to prevent her negligence-based claims from accruing.

The District Court concluded that Blackburn's claims for negligence and medical negligence accrued on January 20, 1990. Having reviewed the record, we

conclude that, pursuant to §27-2-102(1), MCA, the elements of Blackburn's claims for negligence and medical negligence were present at the time of her abortion in January 1990 or shortly thereafter, and her right to maintain an action on those claims was complete at that time.

Applicable Statute of Limitations

Having concluded that Blackburn's claims for negligence and medical negligence accrued by March 1990 at the latest, this Court must next identify the statute of limitations period applicable to each claim for negligence and medical negligence and determine whether the limitations period either expired or was properly tolled prior to commencement of the present action.

As noted above, Blackburn has leveled claims of either negligence or medical negligence against each defendant. Blackburn has put forth claims of negligence, to which the statute of limitations codified at §27-2-204, MCA, applies, against Blue Mountain Clinic, its counselor Jane Doe, as well as against Dr. Pratt and DPHHS. Blackburn has also asserted medical malpractice claims, to which §27-2-205, MCA, applies, against the Blue Mountain Clinic physician who performed the abortion, the Blue Mountain Clinic, the BSB Health Department and the two nurses employed by the BSB Health Department.

We will address each of the above allegations of negligence and medical negligence in turn.

1. Medical Malpractice

The applicable period of limitations for medical negligence claims is codified at §27-2-205, MCA, which provides that an:

> **(1) Action in tort or contract for injury or death against a physician or surgeon, ...registered nurse...or licensed medical professional corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must...be commenced within 3 years after the date of injury or within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error or omission would have been known to the defendant.**

By its terms, §27-2-205, MCA, prescribes a three-year period for commencement of a claim for medical negligence brought against, among others, physicians and registered nurses. Accordingly, 27-2-205, MCA, applies to several of the defendants against whom Blackburn levels negligence-based claims. For example, this statute clearly applies to her allegations of medical negligence on the part of the physician at the Blue Mountain Clinic who performed the abortion procedure on

January 20, 1990. The same section further applies to Blackburn's claims against Blue Mountain Clinic itself, insofar as Blackburn seeks to hold the clinic vicariously liable for the conduct of its physician employee.

Section §27-2-205, MCA, additionally applies to Blackburn's claims for medical negligence against registered nurses Cossel and Terri Doe. Finally, §27-2-205, MCA, applies to Blackburn's claims against the BSB Health Department to the extent she seeks to hold the Department vicariously liable for the alleged professional negligence of two registered nurses in its employment.

Conversely, as discussed *infra* §27-2-205, MCA, does not govern Blackburn's claims of negligence against the fictitiously named Blue Mountain Clinic counselor Jane Doe, or her claims against the clinic itself insofar as Blackburn seeks to hold the clinic vicariously liable for the counselor's conduct. Rather, the statute of limitations for negligence claims, codified at §27-2-204, MCA, and the tolling provisions contained in §27-2-102, MCA, apply to each of these claims, as well as to Blackburn's allegations of negligence on the part of Dr. Pratt and DPHHS.

The District Court concluded that §27-2-205(1), MCA, precludes each of Blackburn's claims for medical malpractice, although it did so without specifically addressing, as we do below, the question of whether the statute's second sentence may toll Montana's five-year medical malpractice statute of repose under certain circumstances. Instead, the District Court simply found that the defendants did not attempt to conceal information from Blackburn, and that, pursuant to our reasoning in *Major v. North Valley Hospital* (1988), 233 Mont. 25, 30, 759 P.2d 153, 157, Blackburn has alleged no facts which would toll the statute of limitations in this case.

Pursuant to the first sentence of §27-2-205(1), MCA, Blackburn had three years from the date of her injury or from the date by which she discovered or, through the use of reasonable diligence, should have discovered her injury, within which to file suit for medical malpractice against the Blue Mountain Clinic physician John Roe and BSB Health Department nurses Cossel and Terri Doe. Should we conclude, however, that the statute's subsequent five-year statute of repose precludes Blackburn's claims for medical malpractice, we need not reach the question of whether the three-year statute of limitations was tolled.

The five-year statute of repose, which governs our present inquiry, provides that "in no case may an action be commenced after 5 years from the date of injury." *See Webb v. T.D., et. al.* (1996), 275 Mont. 243, 247, 912 P.2d 202, 205 (characterizing the five-year period in §27-2-205(1), MCA, as a statute of repose). As discussed above, we conclude that Blackburn's cause of action accrued, and her injury accordingly occurred, no later than March 1990. However, Blackburn did not file the present action until November 1995, more than five and one-half years later. Therefore, unless properly tolled, the five-year statute of repose provision contained in the first sentence of §27-2-205, MCA, bars Blackburn's present claims for medical malpractice.

In the absence of specific statutory language to the contrary, a statute of repose such as the one codified in §27-2-205(1), MCA, is not subject to tolling. *See First United Methodist Church of Hyattsville v. United States Gypsum Co.* (4th Cir. 1989), 882 F.2d 862, 866, *cert. denied* (1990), 493 U.S. 1070, 110 S.Ct. 1113, 107 L. Ed. 2d 1020. We conclude that Montana's medical

malpractice statute contains just such a statutory tolling provision. Specifically, the second sentence of §27-2-205, MCA, directly follows the language which establishes the five-year statute of repose and reads:

> However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant, or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.

This Court will construe a statute in accordance with the plain meaning of its terms. *State v. Martel* (1995), 273 Mont. 143, 150, 902 P.2d 14, 17 (citing *State v. Lilburn* (1994), 265 Mont. 258, 266, 875 P.2d 1036, 1041, *cert. denied* (1995), 513 U.S. 1078, 115 S. Ct. 726, 130 L.Ed.2d 630). The first sentence of §27-2-205(1), MCA, ends with the provision that "in no case may an action be commenced after 5 years from the date of injury," thereby creating a five-year statute of repose for medical malpractice actions. Basic statutory construction and a plain reading of the statute compel the conclusion that the subsequent phrase "this time limitation," refers to and modifies the immediately preceding five-year time limitation.

Further, to interpret the second sentence of §27-2-205, MCA, as anything other than a tolling provision applicable to the statute of repose immediately preceding it would be to effectively permit a health care provider who learns of a prior negligent act, error, or omission to conceal that information from a patient and obtain eventual immunity from suit. Accordingly, we hold that,

pursuant to the specific terms of §27-2-205(1), MCA, a plaintiff must commence an action for medical malpractice no later than five years after the date of injury except where a health care provider fails "to disclose any act, error, or omission upon which an action is based and that is known to the defendant, or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant."

Having determined that the second sentence of §27-2-205(1), MCA, may, under certain circumstances, toll the five-year statute of repose applicable in a medical malpractice action, this Court must next determine whether it did so in the instant case. Here, the five-year statute of repose may not preclude Blackburn's claims for malpractice in the event that the physician who performed the abortion and the two registered nurses who counseled Blackburn each failed "to disclose [an] act, error, or omission upon which" Blackburn's medical malpractice "action is based and that [was] known to the defendants or through the use of reasonable diligence subsequent to the act, error or omission would have been known (sic) the defendant."

Under different circumstances, we have previously recognized that the tolling provision contained in the second sentence of §27-2-205(1), MCA, essentially codifies the common law doctrine of fraudulent concealment. *Major,* 233 Mont. at 31, 759 P.2d at 157. In *Major*, we recognized that "[i]t is the cause of action which must be fraudulently concealed by failing to disclose the fact of injury from malpractice, by diverting the patient from discovering the malpractice that is the basis of the action." *Major,* 233 Mont. at 31, 759 P.2d at 157 (quoting *Monroe v. Harper* (1974), 164 Mont. 23, 28, 518 P.2d 788, 790). In both *Major* and *Monroe*, pursuant

to the doctrine of fraudulent concealment, we required an affirmative act of diversion by the defendant, aimed at misleading or preventing inquiry by the patient, to toll the statute of limitations in a medical malpractice action. *Monroe*, 164 Mont. at 28, 518 P.2d at 790.

By its express terms, however, the second sentence of §27-2-205(1), MCA, tempers the doctrine of fraudulent concealment and states that a failure to disclose certain facts may be sufficient to toll the five-year statute of repose. Indeed, in *Wisher v. Higgs* (1993), 257 Mont. 132, 145, 849 P.2d 152, 160, we clarified that, pursuant to the specific terms of §27-2-205(1), MCA, simple "failure to disclose facts, as opposed to affirmative, fraudulent concealment, is sufficient to toll the statute." Therefore, both *Major* and *Monroe* are overruled insofar as they suggest that an affirmative act by the health care provider is required to trigger the tolling provision of §27-2-205(1), MCA.

We also note that in both *Major* and *Monroe*, as well as in *Wisher*, this Court inappropriately evaluated the tolling provision contained in the second sentence of §27-2-205(1), MCA, in discussions regarding the statute of limitations in medical malpractice cases. Having held in the present case that the second sentence of §27-2-205(1), MCA, applies exclusively to toll the five-year statute of repose under certain limited circumstances, we additionally overrule *Major, Monroe,* and *Wisher*, to the extent they suggest that the statutory provision may apply to toll the statute of limitations in medical malpractice cases.

Pursuant to the specific terms of the statute, we hold that a failure to disclose facts may toll the five-year statute of repose, but only where that failure to disclose is

an act separate from the alleged act of malpractice upon which the claims for professional negligence rests. In other words, by its terms, the statute's tolling provision applies where a health care worker learns, or through the use of reasonable diligence would have learned, that he or she committed an error but subsequently conceals or fails to disclose that error to the patient.

Here, Blackburn alleges medical malpractice on the part of the Blue Mountain Clinic physician who performed the abortion, as well as on the part of the two BSB Health Department nurses who counseled and treated her prior to her abortion. The central allegation upon which Blackburn bases her claims for medical malpractice is that each of these defendants failed to disclose to her the fact that, because she was not HIV positive, she could not deliver an HIV positive baby. Blackburn also alleges professional negligence on the part of these three defendants for their alleged failure to inform her of the risks associated with the abortion procedure. Thus, Blackburn alleges medical malpractice based on defendants' alleged failure to disclose accurate medical information.

Blackburn does not, however, allege any separate failure to disclose as required by the medical malpractice statute's tolling provision. Rather, the failure to disclose accurate medical information which Blackburn alleges constitutes the very act of medical malpractice for which she seeks to recover. Blackburn simply alleges no act, affirmative or otherwise, separate from the alleged act of malpractice. Blackburn does not allege that defendants ever learned of, or through the use of reasonable diligence would have learned of, their alleged failure to disclose accurate medical information or that they

subsequently concealed or failed to disclose that information to Blackburn.

Accordingly, we conclude that the tolling provision contained in §27-2-205(1), MCA, does not delay the expiration of the five-year statute of repose in this case, and that Blackburn's claims for medical malpractice are barred. Having held that the five-year statute of repose bars Blackburn's claims for medical malpractice, we do not reach the question of whether the three-year statute of limitation was tolled.

Based on the foregoing, we hold the District Court correctly concluded that §27-2-205(1), MCA, precludes Blackburn's claims for medical malpractice and affirm their dismissal by the District Court. Specifically, we conclude that the five-year statute of repose bars Blackburn's medical malpractice claims against the fictitiously named physician, John Roe, and the Blue Mountain Clinic, insofar as Blackburn seeks to hold the clinic vicariously liable for the physician's conduct. We further conclude that the statute of repose additionally bars Blackburn's medical malpractice claims against registered nurses Cossel and Terri Doe, as well as against the BSB Health Department to the extent that Blackburn seeks to hold it responsible for the actions of its registered nurse employees.

2. Negligence

Blackburn brings a number of negligence-based claims which do not fall within the parameters of Montana's medical malpractice statute, but are instead governed by the statute of limitations for negligence claims, codified at §27-2-204, MCA, and the tolling provisions contained in §27-2-102(3), MCA. Specifically,

Blackburn brings claims of negligence against the Blue Mountain Clinic and its counselor, Jane Doe, as well as against Dr. Pratt and DPHHS.

Blackburn alleges that Jane Doe, the Blue Mountain Clinic counselor with whom Blackburn had repeated contact both prior to and following her abortion, failed to provide Blackburn with sufficient information upon which she could base her decision to have an abortion, and treated her negligently in the days following the procedure. Blackburn also alleges negligence on the part of Blue Mountain Clinic, and seeks to recover damages pursuant to the theory of *respondeat superior*. Finally, Blackburn levels claims of negligence against DPHHS and its medical director, Dr. Sidney Pratt, apparently contending they negligently supervised the BSB Health Department in a number of respects.

Section §27-2-204, MCA, provides the applicable period of limitations for tort actions, including claims for negligence such as the ones presented here. *See, e.g., Sorenson v. Massey-Ferguson, Inc.* (1996), 279 Mont. 527, 529, 927 P.2d 1030, 1031. Section §27-2-204(1), MCA, provides that "[t]he period prescribed for the commencement of an action upon a liability not founded upon an instrument in writing is within 3 years." Here, we have determined that the requisite elements of Blackburn's claims for negligence were present by March 1990 and that her claims accrued at that time. However, Blackburn did not commence this action, by way of filing her complaint, until November 29, 1995, more than five and one-half years after her cause of action accrued.

Blackburn argues that, even if her claim accrued earlier, pursuant to the discovery doctrine, the statute of limitations did not begin to run until 1995 when she first

consulted an attorney and learned she had received erroneous medical information prior to her abortion. Alternatively, Blackburn maintains the statute of limitations began to run, at the earliest, in 1993 when Dr. Moore diagnosed her with depression and she thus discovered the facts constituting her claim.

Section §27-2-102(3), MCA, codifies the discovery doctrine applicable to general negligence cases pursuant to which

> [t]he period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claims have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:
>
> (a) the facts constituting the claims are by their nature concealed or self-concealing; or
>
> (b) before, during or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

In apparent reliance upon §27-2-102(3)(b), MCA, but without specifically analyzing §27-2-102(3)(a), MCA, the District Court concluded that, as the record contained no evidence that the defendants affirmatively acted to conceal the facts constituting Blackburn's claim from her, the statute of limitations barred Blackburn's claims for negligence. Having reviewed the record, and for the reasons stated below, we hold the trial court correctly concluded the statute of limitations bars Blackburn's negligence claims against Dr. Pratt and DPHHS, but erred in concluding that statute similarly precludes her claims against the Blue Mountain Clinic and its counselor.

a. Blue Mountain Clinic and Counselor Jane Doe

Blackburn alleges negligence on the part of the Blue Mountain Clinic, by way of inadequate treatment she allegedly received from clinic counselor Jane Doe, in a number of respects. As she does with respect to several of the defendants in this case, Blackburn primarily contends the counselor failed to inform Blackburn that, because she was HIV negative her baby would not be born HIV positive, and, therefore, that an abortion was unnecessary. Blackburn additionally alleges the counselor failed to inform her of the risks associated with the abortion procedure, and provided her with substandard care in the days following the abortion.

As noted above, §27-2-102(3)(a), MCA, may toll the statute of limitations in a negligence case where the facts constituting the claim are self-concealing, thereby preventing their discovery by the plaintiff. We have previously addressed the nature of self-concealing injuries in the context of medical malpractice claims. *See Grey v. Silver Bow County* (1967), 149 Mont. 213, 217, 425 P.2d 819, 821 (infection introduced during surgery due to hospital's failure to use proper sterile techniques considered a self-concealing injury); *Johnson v. St. Patrick's Hosp.* (1966), 148 Mont. 125, 417 P.2d 469, *aff'd after remand* (1968), 152 Mont. 300, 448 P.2d 729.

In 1987, the Montana Legislature amended §27-2-102, MCA, to address the unique problems presented by self-concealing injuries. *See* §27-2-102(3), MCA. In so doing, the Legislature specifically exempted application of §27-2-102(3), MCA, to medical malpractice actions which are instead governed by the limitations period and tolling

provisions codified at §27-2-205, MCA. In order to properly calculate a particular statute of limitations period, it is necessary to determine the date that the period of limitations begins to run. In such circumstances, §27-2-102(3)(a), MCA, protects plaintiffs against the harsh results of having their claim barred before they even know it exists. Our precise inquiry at this juncture, then, is whether Blackburn's injury is of a self-concealing nature, thereby bringing her claim for negligence within the protection afforded by §27-2-102(3)(a), MCA.

Here, the negligent act alleged by Blackburn is the withholding of accurate medical information by the Blue Mountain Clinic counselor. It is this alleged withholding of information which forms the basis for Blackburn's negligence claim. Nondisclosure of information is, by its nature, self-concealing. We conclude that the alleged facts upon which Blackburn's claim for negligence against the Blue Mountain Clinic counselor rests were, by their nature, self-concealing. So too, then, was the very nature of Blackburn's injury self-concealing. Blackburn could not have discovered she underwent an unnecessary abortion until she learned the counselor had withheld from her accurate medical information which Blackburn needed in order to make an informed decision regarding whether to obtain an abortion.

In any event, Blue Mountain Clinic argues Blackburn failed to exercise due diligence in discovering her claim as required by the tolling provision at §27-2-102(3), MCA. Under the facts alleged, however, we are unable to reach such a conclusion. After her abortion, Blackburn sought no additional advise regarding the risks of abortion or the transmission of HIV. Blackburn had no reason to suspect that the Blue Mountain Clinic Counselor had provided her with inaccurate information.

Under the facts as alleged by Blackburn, a trier of fact might find circumstances which warrant tolling the three-year negligence statute of limitations until the date by which it determines Blackburn, through due diligence, should have discovered that information withheld by the Blue Mountain Clinic counselor caused her to undergo an unnecessary abortion. As we note above, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Willson*, 194 Mont. at 126, 634 P.2d at 1182. Here, it is conceivable that Blackburn could prove a set of facts which would warrant tolling the statute of limitations, and which would support a claim of negligence against the Blue Mountain Clinic counselor for her alleged failure to disclose the risks of abortion and the truth about HIV transmission.

Based on the foregoing, we conclude the facts constituting select portions of Blackburn's claims for negligence against the counselor, and therefore against Blue Mountain Clinic itself, were self-concealing as contemplated by the tolling provision of §27-2-102(3), MCA. We hold that the facts constituting Blackburn's claims of negligence were self-concealing to the extent that Blackburn alleges clinic counselor Jane Doe failed to disclose the risks of abortion and failed to reveal the truth about the transmission of HIV. Whether Blackburn may be able to demonstrate she exercised due diligence sufficient to trigger the tolling provision of §27-2-102(3), MCA, cannot yet be determined.

We additionally conclude that Blackburn's allegations that the clinic counselor provided her with substandard care in the days following the abortion are

not of a self-concealing nature, and that the tolling provision of §27-2-102(3), MCA, does not apply to these claims.

Accordingly, we hold the District Court erred in concluding that, as a matter of law, §27-2-204(1), MCA, precludes Blackburn's claims of negligence, based on the withholding of accurate medical information, against Blue Mountain Clinic and its counselor. However, we hold the District Court properly concluded that §27-2-204(1), MCA, precludes her claims of negligence based on allegedly substandard care she received following the abortion.

b. Dr. Pratt and DPHHS

Blackburn generally alleges negligence on the part of DPHHS and its medical director, Dr. Sidney Pratt. Blackburn apparently contends that Dr. Pratt and DPHHS negligently supervised the BSB Health Department. As Blackburn makes no allegations of medical negligence, or medical malpractice, against Dr. Pratt, the three-year limitations period codified in §27-2-204(1), MCA, and the discovery doctrine appearing at §27-2-102(3), MCA, govern her claims both against DPHHS as well as against Dr. Pratt.

As it did with respect to Blackburn's negligence claims brought against the remaining defendants, the District Court concluded the applicable three-year statute of limitations precluded Blackburn's claims for negligence against Dr. Pratt and DPHHS. *See* §27-2-204(1), MCA. Having reviewed the record, we affirm this determination by the District Court.

As noted above, although Blackburn's claims accrued by March 1990, she did not commence the

present negligence action until November 1995, well beyond the applicable three-year statutory limitations period. Thus, we must determine whether the discovery doctrine, codified at §27-2-102(3), MCA, tolls the limitations period with respect to Blackburn's claims for negligence against Dr. Pratt and DPHHS.

Having reviewed the record, we conclude the District Court properly concluded that, pursuant to §27-2-102(3)(b), MCA, neither Dr. Pratt nor DPHHS in any way concealed information regarding Blackburn's claim from her. Although the District Court did not specifically do so, we evaluate §27-2-102(3)(a), MCA, and further conclude that the facts constituting her claims against Dr. Pratt and DPHHS were not, by their nature, self-concealing. Accordingly, neither of the conditions necessary to trigger application of the discovery doctrine and subsequent tolling of the statute of limitations is satisfied with respect to Blackburn's negligence claims against Dr. Pratt and DPHHS. Based on the foregoing, we hold the District Court properly concluded the statute of limitations precludes Blackburn's negligence claims against Dr. Pratt and DPHHS.

ISSUE 2

Did the District Court err in concluding the applicable statute of limitations barred Blackburn's claims for assault and battery?

In addition to allegations of negligence and medical negligence, Blackburn brings claims for assault and battery against various defendants. Specifically, Blackburn contends she did not give her informed consent to the abortion procedure because no one advised her that an HIV negative mother could not deliver an HIV positive baby and no one explained any of the

risks associated with an abortion. Blackburn maintains that, because she did not consent to the abortion, defendants committed an assault and battery against her person. Accordingly, Blackburn has leveled a claim for assault and battery against the Blue Mountain Clinic physician who performed the abortion, the counselor employed by the clinic, and the Blue Mountain Clinic itself. Blackburn also alleges assault and battery by registered nurses Cossel and Terri Doe, and their employer, the BSB Health Department.

Pursuant to §27-2-204(3), MCA, a two-year statute of limitations governs claims for assault and battery. The elements constituting Blackburn's claim for assault and battery were present at the time of her January 20, 1990, abortion, so her claim therefore accrued, and the limitation period began to run, at that time. *See* §27-2-102(1) and (2), MCA. Blackburn did not commence her present action until November 1995, well beyond the permissible two-year limitation period.

Further, we conclude that neither of the tolling provisions contained in §27-2-102(3), MCA, apply to delay the running of the two-year period in this case. The facts constituting Blackburn's claim for assault and battery, an intentional tort, were not self-concealing as contemplated by §27-2-102(3)(a), MCA. Further, we conclude defendants took no action to prevent Blackburn from discovering her alleged injury or its cause. Section §27-2-102(3)(b), MCA. Accordingly, we hold the District Court correctly concluded the applicable two-year statute of limitations bars plaintiffs claims for assault and battery.

ISSUE 3

Did the District Court err in concluding that Blackburn's 42 U.S.C. §1983 civil rights claim is barred by

the applicable statute of limitations and fails as a matter of law?

By way of her amended complaint, Blackburn alleges defendants violated her civil rights pursuant to 42 U.S.C. §1983, by failing to disclose to her the risks associated with an abortion and by failing to inform her that an HIV negative mother could not give birth to an HIV positive infant. Blackburn also alleges that defendants violated her Fourteenth Amendment rights.

In response, defendants maintain that Blackburn's §1983 civil rights claims are barred by the applicable statute of limitations. Alternatively, defendants argue Blackburn has failed to state a claim for relief pursuant to 42 U.S.C. §1983 and her claims must fail as a matter of law.

A. Statute of Limitations

Defendants argue that the statue of limitations precludes Blackburn's §1983 claims. The District Court agreed, concluding that, because the applicable statutes of limitation bar Blackburn's claims for medical malpractice, negligence, and assault and battery, so too do they preclude her §1983 claims.

The limitation period applicable to a §1983 action is the statute of limitation for personal injury actions in the state in which the claim accrues. *Owens v. U.U. Okure* (1989), 488 U.S. 235, 250, 109 S.Ct. 573, 582, 102 L.Ed. 2d 594, 606; *Wilson v. Garcia* (1985), 471 U.S. 261, 276, 105 S.Ct. 1938, 1947, 85 L.Ed. 2d 254, 266. State law additionally governs questions of tolling. *Wilson,* 471 U.S. at 268; *see also Vaughan v. Grijalva* (9th Cir. 1993), 927 F.2d 476, 478.

Thus, in the instant case, Montana's three-year statute of limitation governing personal injury actions, codified at §27-2-204(1), MCA, applies to Blackburn's civil rights claims. As we have discussed above, with the exception of certain allegations against Blue Mountain Clinic and its counselor Jane Doe, all of Blackburn's claims for medical malpractice, negligence, and assault and battery are precluded by the periods of limitation codified at 27-2-205, -204(1), and -204(3), MCA.

Blackburn's civil rights claims essentially rest upon the same facts which compromise her various claims for medical malpractice, negligence, and assault and battery. Just as Montana's statute of limitations bars the majority of these claims, so too does it bar most of her §1983 claims.

Accordingly, with respect to all defendants except the Blue Mountain Clinic and its counselor Jane Doe, we hold the District Court correctly concluded that Blackburn cannot assert any set of facts which state a claim for which relief may be granted pursuant to 42 U.S. §1983, and her civil rights claims are precluded by the statute of limitations.

B. Failure to State a Claim

Each defendant alternatively argues that Blackburn has failed to state a claim for which relief may be granted, and that her §1983 claims must therefore fail as a matter of law. Having concluded that Blackburn's §1983 claims are precluded by the statute of limitations, however, we need only address this alternative argument as it applies to the Blue Mountain Clinic and its counselor.

Section §1983 provides in pertinent part that:

> [E]very person who, under color of any state [law]...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper procedure for redress.

42 U.S.C. §1983.

Therefore, to state a claim pursuant to 42 U.S.C. §1983, a plaintiff must allege the presence of, as well as the deprivation of, a federally protected right, privilege, or immunity. A plaintiff must additionally allege the defendant caused the deprivation of that right, privilege, or immunity, and in so doing acted under color of state law. *See, e.g., Lugar v. Edmonson Oil Co.* (1982), 457 U.S. 922, 931, 102 S. Ct. 2744, 2750, 73 L. Ed.2d 482, 491; *Parratt v. Taylor* (1981), 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed.2d 420, 428, *overruled on other grounds, Daniels v. Williams* (1986), 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed.2d 662; *Gomez v. Toledo* (1980), 446 U.S. 635, 640, 100 S. Ct. 1920, 1923, 64 L. Ed.2d 572, 577.

Blue Mountain Clinic argues that Blackburn has failed to properly state a claim for relief against it pursuant to 42 U.S.C. §1983. In particular, Blue Mountain contends Blackburn has failed to allege the presence of a federally protected right, and has failed to allege facts which might demonstrate that Blue Mountain Clinic acted under color of state law. Consequently, Blue Mountain

argues, Blackburn's civil rights claims must fail as a matter of law.

1. Federally Protected Right

To properly state a claim for relief pursuant to 42 U.S.C. §1983, Blackburn must allege, among other items, the presence of a federally protected right. Although §1983 provides a remedy for violations of federal rights, it does not in itself create or provide a party with substantive rights. *See, e.g., Albright v. Oliver* (1994), 510 U.S. 266, 271, 114 S. Ct. 807, 811, 127 L. Ed.2d 114, 122, *rehearing denied by* 520 U.S. 1215, 114 S. Ct. 1340, 127 L. Ed.2d 688.

In her amended complaint, Blackburn frequently refers to and alleges various violations of Title X of the Public Health Service Act. For example, Blackburn alleges that defendants inappropriately used federal funds in violation of 42 U.S.C. 300a-6 which provides in pertinent part that "[n]one of the federal funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." We conclude, as did the District Court below, that those provisions of Title X of the Public Health Service Act upon which Blackburn relies do not confer upon her the substantive rights she claims. Accordingly, we hold Blackburn has failed to allege a violation of her substantive rights as necessary in an action pursuant to 42 U.S.C. §1983.

2. Under Color of State Law

To properly state a claim for relief pursuant to 42 U.S.C. §1983, Blackburn must additionally allege that any deprivation of a federal right was proximately caused by a defendant who was exercising "some right or privilege

created by the State, by a rule of conduct imposed by the State, or by a person for whom the State is responsible." *Lugar,* 457 U.S. at 937. Blackburn must allege facts to demonstrate Blue Mountain Clinic was a "state actor."

Review of the record indicates Blackburn has failed to do so. She alleges no facts that would sufficiently show Blue Mountain Clinic, or its employees, were state actors, acted under color of state law, or acted in concert with state officials in counseling and treating her.

DPHHS

Further, although we need not do so in light of our determination that Blackburn's §1983 claim against DPHHS is barred by the statute of limitation, we additionally note that, in any event, she has failed to state a claim for which relief may be granted as against DPHHS. Pursuant to the explicit terms of §1983, a plaintiff may only bring a §1983 claims against a "person". In *Will v. Michigan Dep't of State Police* (1989), 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed.2d 45, 58, the United States Supreme Court held that neither a state nor a state agency is a person within the meaning of §1983. DPHHS is a state agency, and Blackburn's claim against it therefore fails as a matter of law.

Based on the foregoing, we hold the District Court correctly concluded that Blackburn failed to allege a violation of her substantive rights and that each of her §1983 claims, including those against Blue Mountain Clinic and its counselor, must fail as a matter of law. Based on the foregoing, we conclude that, as a matter of law, Blackburn has not stated a claim for which relief may be granted pursuant to 42 U.S.C. §1983, and we affirm the District Court's order dismissing each and every one of her civil rights claims.

ISSUE 4

Did the District Court err in dismissing Blackburn's claims brought on behalf of her aborted fetus?

Blackburn filed the present action, not only on her own behalf, but also as the "Personal Representative of the Estate of Baby Boy Doe, Deceased." As such, Blackburn seeks to bring a number of claims on behalf of her unborn fetus against defendants.

A. 42 U.S.C. §1983

Blackburn contends defendants violated the civil rights of her unborn fetus, and accordingly attempt to allege a claim on behalf of her fetus pursuant to 42 U.S.C. §1983. Blackburn's fetus, however, is not a "person" on whose behalf a civil rights action may be commenced pursuant to 42 U.S.C. §1983 for deprivation of rights. *Reed v. Gardner* (7th Cir. 1993), 986 F.2d 1122, 1127-28, *cert. denied* (1993), 510 U.S. 947, 114 S. Ct. 389, 126 L. Ed.2d 337; *McGarvery v. Magee-Women's Hospital* (D. Pa. 1972), 340 F. Supp. 751, 754, *aff'd by* (3rd. Cir. 1973), 474 F.2d 1339. Blackburn's §1983 claim brought on behalf of the fetus thus fails as a matter of law.

B. State Law Claims

Each state law claim which Blackburn alleges on her own behalf, she additionally alleges on the behalf of her unborn fetus. This Court has recognized a claim of wrongful death for a stillborn fetus, and held that a full-term fetus may be considered a person for the purpose of Montana's wrongful death statute. *Strzelczyk v. Jett* (1994), 264 Mont. 153, 158, 870 P.2d 730, 733.

However, we limited our holding in *Strzelczyk* to the facts of that case, recognizing only a full-term, stillborn fetus as a person. Unlike *Strzelczyk*, the instant case involves an attempt by Blackburn to bring an action on behalf of a first-trimester, non-viable fetus. Under Montana law, Blackburn may not maintain an action for the death of a non-viable fetus. *Kuhnke v. Fisher* (1984), 210 Mont. 114, 120, 683 P.2d 916, 919.

Based on the foregoing, we hold the District Court correctly concluded that Montana does not recognize a cause of action for a first-trimester, non-viable fetus, and properly dismissed Blackburn's claims brought on its behalf.

We Concur: Justice J. A. Turnage
Justice Karla M. Gray
Justice W. William Leaphart

Justice James C. Nelson concurs in part and dissents in part.

> I concur with the analysis and in everything stated in the Court's opinion except as to that part of the discussion of Issue 1 wherein we hold that in order to toll the five-year statute of repose, the failure to disclose must be *an act separate from the alleged act of malpractice* upon which the claim for professional negligence is based. In my opinion, the plain, unambiguous language of §27-2-205(1), MCA, does not contain that sort of restriction. Moreover, I conclude that, in judicially imposing this construction on the statute, we have

> deprived a whole class of medical-malpractice plaintiffs of the protection of the tolling provisions that the legislature enacted.
>
> **I begin my analysis with those well-established, oft-cited rules of statutory construction that have become axiomatic:**
>
> In interpreting a statute, we look first to the plain meaning of the words it contains. [Citation omitted]. Where the language is clear and unambiguous, the statue speaks for itself and we will not resort to other means of interpretation. [Citation omitted.] "In the search for plain meaning, 'the language used must be reasonably and logically interpreted giving words their usual and ordinary meaning.'" [Citation omitted.]

Werre V. David (1996), 275 Mont. 376, 385, 913 P.2d 625, 631. Moreover,

> **[i]n the construction of a statue, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.**

Section 1-2-101, MCA.

We have properly concluded that the five-year statute of repose in §27-2-205(1), MCA, is tolled by language in the statute itself

> for any period during which there has been a failure to disclose an act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.

Contrary to the majority opinion, however, a reading of the plain language of this tolling provision reveals no requirement whatsoever that the failure to disclose be an act separate from the malpractice itself. The elements of the statute-of-repose tolling provision are simple and straightforward. There must be:

(a) a failure to disclose any act, error, or omission
(b) upon which an action is based and
(c) that is known to the defendant or
(d) through the use of reasonable diligence subsequent to the act, error or omission would have been known to the defendant.

Moreover, under the statutory language, tolling takes place "for *any period* during which there has been a failure to disclose." Section §27-2-205(1), MCA (emphasis added). Obviously, "*any period*" would include a failure to disclose either coincidental with or subsequent to the malpractice and, where the failure to disclose *is* the malpractice, then logically the failure to disclose cannot be an act separate from the malpractice itself.

The majority can point to no statutory language that supports the interpretation that it has placed on the

subject language. Rather, it has impermissibly failed to look first to the plain meaning of the words the statute contains and then reasonably and logically interpret the statutory language giving words their usual and ordinary meaning. The majority has improperly inserted that which the statute does not require--and element that the failure to disclose be a separate act.

The mischief in the Court's interpretation of the statute cannot be fully appreciated until one understands that, under this construction, a whole class of medical-malpractice plaintiffs has now been deprived of the protection of the tolling provisions of the statutes of repose that the legislature enacted. In those cases where the failure to disclose *is* the malpractice--for example, in those cases where the injured plaintiff did not give informed consent to the offending treatment because the health-care provider negligently failed to disclose the risks attendant to the procedure--there can now be no tolling of the statute of repose because the malpractice and the failure to disclose are not separate acts; rather, they are one and the same act, error or omission.

To illustrate, assume the health-care provider fails to disclose a particular known risk attendant to a surgical procedure and, knowing that he has not properly advised the patient of this risk, he obtains consent for the procedure nonetheless. Five years and one day following the procedure the latent effects attendant to the risk manifest themselves in injury to the patient. Assume further that the health-care provider made no mention of his negligent failure to disclose the risk to the patient during the five years following his pre-surgery consultation. Under our decision, the patient is barred from filing a malpractice claim based upon lack of informed consent, notwithstanding the health-care

provider's failure to disclose, because, under our decision here, the failure to disclose is the malpractice and is not an act, error or omission separate from the malpractice.

If the purpose of the "failure to disclose" provision in the tolling of the statute of repose is to protect the public from dishonest health-care providers and to encourage negligent health-care providers to disclose their malpractice so that injured patients might be able to timely seek corrective medical treatment and avoid further or prolonged injury, then we have effectively denied these remedial aspects of the statute to this whole class of informed-consent plaintiffs. Importantly, we have also deprived plaintiff Blackburn of the tolling protection that the statute was enacted to provide.

I would hold that Blackburn's medical malpractice claims which are premised in her allegation that her health-care providers failed to disclose to her that, being HIV negative, she could not give birth to an HIV-positive baby, are not barred by the five-year statute of repose. Rather, liability under this theory presents factual questions that should be resolved by the jury.

I dissent.

Justices Terry N. Trieweiler and William E. Hunt, Sr., concur in the foregoing dissent and concurrence.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 96-408

AMY BLACKBURN, Individually, and as Personal Representative of the Estate of Baby Boy Doe, Deceased,

Plaintiff and Appellant,

v.

BLUE MOUNTAIN WOMEN'S CLINIC; et al.,

Defendants and Respondents.

APPEAL FROM:
District Court of the Second Judicial District,
In and for the County of Silver Bow,
The Honorable James E. Purcell, Judge presiding.

APPELLANT'S PETITION FOR RE-HEARING

COUNSEL OF RECORD:

For Appellant:

Robert C. Kelleher, Sr., Butte, MT

For Respondents:

Cynthia K. Smith, Missoula, MT (for Blue Mountain Clinic)
John P. Davis and Tina Moran, Butte, MT (for Butte-Silver Bow County Health Department and Jan Cossel, R.N.)
Thomas G. Bowe, Assistant Attorney General, Helena (for Department of Public Health and Human Services and Sidney Pratt, M.D.)

VIABILITY AN INVALID TEST

M.App.R.34 provides in relevant part:

> ...some question decisive of the case...was overlooked by the court, or that the decision is in conflict with an express statute...to which the attention of the court was not directed...
>
> Not considered were Montana's abortion consent statutes.

50-2-104, MCA (1989)(3)

> "Informed consent" means voluntary consent to an abortion by the woman only after...*full disclosure* to her by the physician who is able to perform the abortion...of (b) the physical and psychological effects of abortion, and available alternatives to abortion, including childbirth and adoption.

50-20-106, MCA (1989)

> (1) No abortion may be performed upon any woman in the absnce of informed consent...
> (4) No public employee of the state or of any local governmental body[1] shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.
> (5) Violation of subsectons (1) and (4) of this section is a misdemeanor.

When the Chief Justice asked in oral argument, "Isn't this just an abortion case?", Appellant's counsel misspoke when he responded, "Yes". On August, 11, 1997, at 11:40 a.m., the Clerk had faxed an Order directing argument would be confined to the statute of limitations and statute of repose. The question, which is crucial here, caught Appellant's counsel by surprise.

It is true Baby Boy Doe was destroyed, or his life terminated, by a means described as an 'abortion'. However, an 'abortion' is legal only with the mother's consent.

Typical of the statutes in 28 other states [Exhibit A] is that of Ohio.

> (B) No person shall cause the death of another or the *unlawful termination of another's pregnancy* as a proximate result of the offender's committing or attempting to commit a

misdemeanor of the 1st, 2nd, 3rd, or 4th degree...

Whoever violates this section is guilty of involuntary manslaughter...(Ohio Revised Code 2903.04)

ARGUMENT

I. WHAT DOES VIABLE MEAN?

What human can survive without other humans? We depend on farmers for our food, builders for our shelter and weavers for our clothing.

Humans can survive in a limited environment - a narrow range of temperatures, altitude - we need a certain atmosphere and gravity. The unborn survive in a fluid something none of us could do. We can not live in the ocean like dolphins or in the air like eagles or in space or even on the moon. Does this mean we are not viable?

What toddler coule survive on its own? Are not the quadriplegic, the geriatric and mentally handicapped all dependent on others for their survival? Can we say, then, that they are not human and therefore not entitled to human rights? Can we "pull the plug" on a patient on life support systems without his or her consent because the patient is not viable?

The "not human" or not a "person" argument is nothing new. It has been leveled against blacks, Jews, women, Native Americans, Irish and even the poor to justify the unjustifiable.

After tracing the history from Justice Holmes' 1884 decision that the fetus *en ventre sa mere* had "no juridical existence" but was "an integral part of its mother" (*Dietrich v. Inhabitants of Northampton,* 138 Mass. 14, 52 Am.R. 242), through the dissent of Illonois Justice Boggs in 1900 that a viable child can have a cause of action if subsequently born alive (*Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N.E. 638), Rhode Island's high court found "many counts" in rejecting "Holmes' original pronouncement" have relied "on the proposition, attributed to the civil law, that from the moment of

conception a separate organism with its own identity comes into existence." (emph. supp.)

> ...The myth, perpetuated by Mr. Justice Holmes in 1884, that the unborn fetus is but a part of its mother's body, has long since been laid to rest in both law and medicine.
>
> While we subscribe to the view of the above-mentioned authorities regarding liability of the tortfeasor in a case like this one, we must, consistently with our previous decision in *Sylvia* (101 R.I. at 80,220 A.2d at 224) diverge from their view, consistently with the significance of viability. In *Sylvia,* we were unable logically to conclude that a claim for any injury inflicted prior to viability is any less meritorious than one sustained after. Similarly, in the present instance, logic does not permit the insistence on viability as the line of demarcation between those for whom an action will lie and those who are without rights under the statute.
>
> Simple precepts of logic have carried this small area of law to a point far removed from the position adopted by Mr. Justice Holmes. The momentum of that logic together with our previous hold in *Sylvia* carry us now to the inescapable conclusion that viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those

> persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, as a veritable *non sequitur. (Presley v. Newport Hospital,* 365 A.2d 748, 753-754 (1976).

In 1990 dissenting Justice Holstein in *Rambo v. Lawson,* 799

S.W.2d 62 wrote,

> The viability standard, relied on by two members of the majority as the time when a fatal injury to a fetus gives rise to a wrongful death action, is arbitrary, unworkable and the outgrowth of a fundamental misunderstanding of generally acceptable scientific facts. Viability should be rejected as a standard for determining whether a fetus is a "person" in the context of our wrongful death statute.
>
> At the outset it is important to note that this case is not controlled by the cases involving pregnant women's "right of privacy." In this case, the rights of the expectant mother and the rights of the fetus are parellel and not in conflict. An examination of the history of the law relating to tort causes of action for negligent infliction of prenatal injury begins well before

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

The great Judge (later Justice) Holmes, writing for the Massachusets, Supreme Judicial Court, was the first American to author an opinion on the subject of prenatal injury. *Dietrich v. Inhabitants of Northampton,* 138 Mass. 14 (1884).

Holmes was too impressive a figure in judicial circles to be ignored, even though his notion that "a child is a part of the mother" was inconsistent with both the common law, which he rejected, and rathe clear scientific evidence that the moter and fetus are separate organisms. Nevertheless, Holmes' misapprehensions have continued to confuse and confound American courts as to what constitutes a "person" for purpose of tort recovery.

The concept of viability was invented by Justice Boggs of the Illinois Supreme Court in an effort to avoid the harshness of Holmes' rule in *Dietrich.* The Illinois Supreme Court, relying on *Dietrich*, refused to allow an action for prenatal injuries. *Allaire v. St. Luke's Hosp.*, 184 Ill. 359, 56 N.E. 638 (1900). The majority relied on Holmes' notion that a child is a part of the mother's body. Boggs attacked that tenuous rationale:

A fetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a protion of the period of gestation. Medical science and skill have demonstrated that at a period of gestation in advance of the period of parturition, the fetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all parts and the child remain alive and capable of maintaining life when separated from the mother. If at that period a child so advanced is injured in its limbs and members and is born into the living world suffering from the effects of the injury, is it not sacrificing truth to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?

Id. 56 N.E. at 641.

With the notable exception of *Cooper v. Blanck*, 39 So.2d 352 (La.App 1923), published in 1949, Boggs' dissent was to lie dormant for over forty years. By the 1940's, some common law cases began to seek ways to avoid Holmes' harsh result. Boggs' concept of viability was rediscovered. (cites)

The viability standard for determining when a wrongful death action arises for prenatal injury was first addressed by Missouri courts in *Seggall v. Morris*, 363 Mo. 1224, 253 S.W.2d 577 (1953). There, the mother was pregnant with a viable infant

and was involved in a vehicle accident. Three days later, the child was born alive but, due to injuries sustained in the collision, lived only eighteen days after being born. This court, after citing the growing body of case law which rejected the *Dietrich* rule, stated:

> [I]t is not in accordance with the truth to say the law indulges a fiction when it attributes a legal personality to an unborn child...A number of courts and text writers have reached the same conclusion. We call particular attention to the opinion by Justice McGuire in the case of *Bonbrest v. Kotz, supra,* 65 F.Supp. *loc. cit.* 140(3). The justice ther cited many medical authorities to support the statement, "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception--which is in fact."

Professor Prosser has summarized the problems with utilizing viability:

> **[M]edical authority has long since recognized that an unborn child is in existence from the moment of conception, and for many purposes, its existence is recognized by law. It has been accorded legal status for various purposes in equity, criminal law, property law, and tort law... All writers who have discussed the problem have joined in condemning the total no-duty**

> **rule and agree that the unborn child in the path of the automobile is as much a person in the street as the mother, and should be equally protected under the law...**
>
> [L]ogic is in favor of ignoring the stage at which injury occurs. With the recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary development requirements altogether.
>
> *Prosser and Keeton on the Laws of Tort,* 555, 367-68 (W. Keeton, D. Dobbs, R. Keeton, and D. Owen 5th ed. 1984). (799 S.W.2d at 66-68)

The Missouri Supreme Court abrogated *Rambo,* supra, in 1995 in Connor v. Monkem Co. Inc., 898 S.W.2d 89 citing Judge Holstein's dissent.

> In *Rambo v. Lawson,* 799 S.W.2d 62 (Mo.banc 1990), the Court declined to extend a cause of action for wrongful death to a nonviable unborn child.
>
> Justice Holstein dissented, with Judge Rendlen concurring. He argued that under the plain language of the statute, the curent state of the law, and clear scientific evidence, a fetus should be considered as a person under the wrongful death statute

regardless of its stage of development. He stated:

> Rules of statutory construction should never be applied so as to defeat the purpose of the statute. The viability standard is not the plain language of the statute; it is not consistent with the common law; it is incongruous with reason.

799 S.W.2d at 71. Neither Judge Robertson nor Judge Holstein discussed 1.205 in their opinions.

> All of this is preliminary to the core of the issue before us. That is, in enacting 1.205.2 did the legislature express that a nonviable unborn child be deemed a "person" for the purpose of a 537.080 wrongful death claim?
>
> [4] While 1.205(2) does not mandate any particular result as would an express amendment of 537.080, we cannot avoid the conclusion that the legislature intended the courts to interpret "person" within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her child, even prior to viability. (898 S.W.2d 91-91)

Over 10 years ago, Pennsylvania agreed that life begins at conception, rejecting viability as an "arbitrary periodof gestation" in *Amadio v. Levin,* 501 A.2d 1085 (Pa.1985).

We have since our decision in *Sinkler v. Kneate*, 401 Pa. 267, 164 A.2d 93 (1960), recognized that a child en ventre sa mere is a separate individual from the moment of conception, and have permitted that child to sue for injuries received during gestation when the child is born alive. Implicit in our holding in *Sinkler* is the acknowledgment that a child en ventre sa mere is an individual with the right to be free of prenatal injury. If a child en ventre sa mere is an individual at the time of its injury, then, *fortiori*, the child is also an individual when those injuries cause its death under the wrongful death statute and survival statutes whether the child dies of the injuries just prior to or just after birth.

In short, the "live birth" or "still birth" of a child will not longer be determined of that child's status as an individual under our survival or wrongful death statutes. To be consistent with *Sinkler* and the body of medical knowledge underpinning it, we acknowledge a child en ventre sa mere to be an "individual," "having existence as a separate creature from the moment of conception." *Sinkler*, 401 Pa at 273, 164 A.2d at 96. Henceforth, injuries received by a child en ventre sa mere can form the basis for survival or wrongful death actions as maintained on behalf of a child born alive. Live birth can no longer be a limiting prerequisite to the maintenance of such an action. This is consistent with Mr. Justice Larsen's dissent in *Scott v. Kopp, Id.*, where

> he argues against drawing a line at the birth of a child, its viability, or some other arbitrary period of gestation, and instead concludes that the action should proceed to trial and let the orderly production of evidence by the adversaries prove or disprove causation, injury and damages in each case. (501 A.2d 1085 at 1087)

In 1989, Michigan's Court of Appeals rejected the nonviable argument in a one paragraph decision in *Fryover v. Forbes,* 176 Mich.App. 36,439 N.W.2d 284 (1989).

> Defendants moved for summary dispositon pursuant to MCR 2.116(C)(8) and (10) as to plaintiff's wrongful death suit regarding Karl, claiming that a nonviable fetus is not a person under the wrongful death act. The trial court granted defendant's motion relying on this Court's decision in *Toth v. Goree,* 65 Mich.App. 296, 237 N.W.2d 297 (1975) lv. den., 396 Mich. 836 (1976). We agree with Judge Mather's dissent in *Toth* and, therefore, reverse the trial court's decision. See also *Presley v. Newport Hospital,* 117 R.I. 177, 365 A.2d 748 (1976).
> Reversed and remanded for further proceedings. (439 N.W.ed 284).

Before a Cincinnati jury found a driver guilty who slammed on her brakes in front ofa pregnant driver causing her injury and the death of the unborn, the defendant argued the Ohio statute on vehicular homicide

as pertains to an unborn was unconstitutional. The common pleas judge denied the motion to dismiss saying

> "First of all, the legislature went to extreme measures to insure that O.R.C. 2903.06 would not be used as a method to violate the constitutional rights of the person obtaining an abortion. The question of the constitutionality of this particular statute is in no way related to the issue of abortion. This statute is specifically designed to protect the unborn of our society from the reckless acts of certain persons. A person who chooses to lawfully terminate a pregnancy is not in any way similarly situated to a person who necessarily destroys the unborn child in a mother's womb."
>
> Common Pleas Judge Dinkelacker concluded by citing *Planned Parenthood v. Casey* (1992) 404 U.S. 833: "...the state has ligitimate interest from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child".

A 7.3 weeks old unborn who died of salmonella poisoning was a "person" under South Dakota's Wrongful Death Act according to *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996):

> HDNT 10. Death
>
> Legislature's intent, in using term "unborn child" to expand class of persons for whose loss a wrongful death action could be maintained, was to encompass nonviable

as well as viable children still within the mother's womb. SDCL 21-5-1

HDNT 11. Death

Fact that legislature, subsequently to adding "unborn child" to class of persons for whose wrongful death action could be maintained, defined "unborn child" in criminal statutes in terms of the child's existence from fertilization until live birth, while not controlling on phrase's meaning within wrongful death statute, supported interpretation of that statute as encompassing both viable and nonviable fetuses. SDCL 21-5-1, 22-1-2(50A). (543 N.W.2d 787 at 788)

II. IS THE STATUTE OF REPOSE NOW REPEALED?

Why have a statute of repose it if does not apply to lack of informed consent cases? In its present form, the instant decision nullifies an act of the legislature which 20 years ago was painstakingly and fastifiously drafted by counsel for the Medica/Legal Panel and a present member of this Court. If there is no tolling, there is not need for a statute of repose - only a statute of limitations. On August 11, 1997, only Illinois required a separate act of deception. During oral argument, Appellant's counsel cited to the Court a January, 1997 ndiana case overruling earlier decisions requiring a separate act of deception. Montana is almost alone in requiring a separate act of deceit.

Respectfully Submitted at Vancouver, Washington, this 23rd day of December, 1997.

Robert C. Kelleher, Sr.
Attorney for Plaintiff/Appellant

RULE 27 CERTIFICATION

I swear under penalty of perjury that the preceding Petition consists of 3.027 words and 11 pages.

Dated this 23rd day of December, 1997

_____

Robert C. Kelleher, Sr.
Attorney for Petitioner/Appellant

CERTIFICATE OF MAILING

I, Robert C. Kelleher, Sr., hereby certify that I did, on the 23rd day of December, 1997, mail a true copy of the Appellant's Petition for Re-Hearing to the following:

Robert C. Kelleher, Sr.
KELLEHER LAW OFFICE-BUTTE
Box 397
Butte, MT 59703
Attorney for Plaintiffs-Petitioners
(406) 782-7408

Cynthia K. Smith
CEDERBERG, SHOTT & SMITH
P.O. Box 8234
Missoula, MT 59807
Attorney for Defendant Respondent Blue Mountain Women's Clinic
(406) 721-2100

Thomas G. Bowe
Agency Legal Service Bureau
Box 201401
Helena, MT 59620-1401

John P. Davis
POORE, ROTH & ROBINSON
1341 Harrison Avenue
Butte, MT 59701-4894

Attorney for Defendant-Respondent
Montana Dept. of Public Health and
Human Services
(406) 444-2026

Attorney for Defendant-
Respondent Family Planning
Center of Butte-Silver Bow Unified
Government
(406) 782-1223

Michael G. Eiselein
P.O. Box 1729
Billings, MT 59103-1729
ATTORNEYS FOR AMICUS CURIAE
MONTANA TRIAL LAWYERS ASSOC.
(406) 252-3461

Michael F. McMahon
HARRISON, LOENDORF,
POSTON& DUNCAN, P.C.
2225 Eleventh Ave., Ste. 21
Helena, MT 59601
ATTORNEYS FOR AMICUS
CURIAE
MONTANA MEDICAL
ASSOCIATION
(406) 442-6350

Lisa A. Rodeghiero
315 North 24th Street
P.O. Box 849
Billings, MT 59103
ATTORNEYS FOR AMICUS CURIAE
MONTANA DEFENSE TRIAL
LAWYERS, INC.
(406) 248-2611

Said document was placed in a sealed and postage prepaid envelope and mailed at Vancouver, Washington on above-said date.

_____

ROBERT C. KELLEHER, SR.

STATES THAT PROHIBIT CRIMES AGAINST THE UNBORN CHILD

Nine States define (by statute) the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy:

Arizona
Illinois
Indiana
Louisiana
Minnesota
Missouri
North Dakota
South Dakota
Utah

One State defines (by statute) the killing of an unborn child after the embryonic stage as a form of homicide:

California

Eight States define (by statute) the killing of an unborn child after quickening as a form of homicide:

Florida
Georgia
Michigan
Mississippi
Nevada
Oklahoma
Washington
Wisconsin

Five States define (by statue or case law) the killing of an unborn child after viability as a form of homicide:

Iowa
Massachusetts
South Carolina
Tennessee
Rhode Island

One State defines (by statute) the killing of an unborn child after the twenty-forth week of pregnancy as a form of homicide:

New York

In addition to the foregoing, five States define (by statute) as criminal assaults attacks on pregnant women causing miscarriage or stillbirth:

Arkansas
Iowa
Kansas
New Mexico
Wyoming

Five States define (by statute) nonfatal attacks on an unborn child as criminal offenses:

Illinois
Louisiana
Minnesota
North Dakota
South Dakota

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APPENDIX C

MONTANA SECOND JUDICIAL DISTRICT COURT, BUTTE-SILVER BOW COUNTY

No. 95-C-506

Amy BLACKBURN, Individually and as Personal Representative of the Estate of Baby Boy Doe, deceased,
Plaintiffs,

vs.

Blue Mountain Women'sClinic;
John Roe, M.D.; Jane Doe, Counselor;
Montana Department of Public Health& Human Services;
Director of said Department of Public Health, individually and not in his official capacity;
Sidney Pratt, M.D., Medical Director, Medical Advisory Unit, Montana Department of Public Health, individually and not in his official capacity; Family Planning Center of Butte-Silver Bow
Unified Government; Terri Doe, R.N. and Jan D., R.N., employees of said Family Planning Center,
Defendants.

FIRST AMENDED C O M P L A I N T

COMES NOW the plaintiff and for her First Cause of Action alleges and prays as follows:

JURISDICTION and VENUE

A. The Court has jurisdiction under 27-2-204; 27-2-205[2] and 27-2-231, MCA and venue under 25-2-126, MCA. The Court also has jurisdiction under 42 USC 1983 and 1988.

B. At all times mentioned herein: Plaintiff has been a resident of Butte Silver Bow, Montana; a high school graduate, she is married and has three children. That she has had no training in law or medicine. The Butte-Silver Bow Unified Government Family Planning Center (CENTER), located at 25 W. Front St., Butte and financed by Title X[3] funds held itself out as knowledgeable, authoritative and reliable in the field of providing reproductive health services and family planning advice to women in Butte-Silver Bow. CENTER was under a contract[4] with the Department of Public Health and Human Services[5] (HEALTH), which through its Family Planning Program in its Health Services Division, Family/Maternal & Child Health Bureau, Helena, was

> **"responsible for planning, implementation and evaluation" of each project including "fiscal management, staff development" and ensured "compliance with program regulations" and "staff training"; administered, supervised and controlled training and other operations and procedures of CENTER.**

That Director of HEALTH, Donald Pizzini, deceased, and Dr. Sidney Pratt, Medical Director of HEALTH, were individually responsible for the activities of HEALTH in supervising or failing to supervise the activities of CENTER. That although Defendants Director of HEALTH and Medical Director of HEALTH PRATT know Title X of Public Health Service Act (42 USC 300-300a-41) provides that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning" and knew 42 CFR 59.2, 59.8, 59.9 and 59.10 specifically prohibited counseling on abortion and referrals for abortion and requiring

contractees to be "physically and financially separate from" abortuaries (placed providing abortions) they nonetheless deliberately authorized and directed HEALTH to enter into Title X contracts on family planning with Planned Parenthood-Intermountain of Billings located at 721 N. 29th St., Billings, the same building in which Yellowstone Valley Women's Clinic [which advertises first and second trimester abortions in the Billings telephone directory] does abortions knowing the head of Planned Parenthood-Intermountain was the wife of the abortionist in the same building. That although Director of HEALTH and Medical Director of HEALTH PRATT know Missoula Planned Parenthood publicly and notoriously promoted and counseled abortions said Director and Medical Director with deliberate indifference and intentionally under color of state law personally caused HEALTH to enter into Title X contracts with Planned Parenthood-Intermountain of Billings and Planned Parenthood of Missoula and tenured into a contract with the Family Planning Center of Butte-Silver Bow Unified Government (CENTER) with the identical understanding, to-wit, the employees of CENTER were authorized and directed by HEALTH to counsel clients to have abortions and to arrange for clients to have abortions. That with deliberate indifference these defendants individually under color of state law knew the Helena Family Planning Clinic and Planned Parenthood of Helena as a matter of policy referred pregnant clients to the Helena Valley Women's Clinic, which is owned and operated by the abortionist who operates and owns the said abortuary in Billings at 721 N. 29th St. That in so doing Defendants Director of HEALTH and Medical Director of HEALTH PRATT deliberately ignored the Fourteenth Amendment and other federal rights of the Plaintiff. In so doing these Defendants failed to exercise slight if any care in protecting the federal rights of Plaintiff, and established

an official policy and custom of insuring that contractees including CENTER promote, encourage and arrange for abortions contrary to federal law.

That defendant Blue Mountain Women's Clinic (BLUE MOUNTAIN) located in Missoula, Montana advertises within and outside Missoula as and has been a member of the National Abortion Federation and has specialized in the business of selling abortions; that in 1990 defendant John Roe, M.D. performed abortions and defendant Jane Doe was an abortion-recommending counselor at BLUE MOUNTAIN as its agents. That in 1989 and 1990 defendants Terri Doe, R.N. and Jan D., R.N. were employees of CENTER, acting in the course and scope of their employment as agents for Butte-Silver Bow Unified Government and established the public policy of said Government vis-à-vis abortion and AIDS and held themselves out to the public including plaintiff as authorities on pregnancy and AIDS.

C. CENTER, BLUE MOUNTAIN and HEALTH are not subject to the Medical Legal Panel requirements of Montana state law.[6]

DEFENDANTS ACCESS TO MEDICAL LITERATURE

At all times herein mentioned the several defendants had access to the following libraries, learned journals and treatises:

BUTTE: Montana Tech library: *New England J Medicine* from 1972 to present; *SCIENCE* from 1989 to present. St. James Hospital Library, *Am Jml Obstetrics & Gynecology*, 1989 to present.

HELENA: Carroll College Library: *JAMA (Journal of American Medical Assoc.)* 1969 to present; State Library: *N Engle J Med,* 1966 to present; *JAMA* Dec. 1986 to present; *Am Jml Ob & Gyn,* 1962 to present.

MISSOULA: U of MT Library: *Lancet,* 1947 to present; *JAMA*, 1960 to present; *N Engl J Med,* 1944 to present; *Am Jrnl Ob & Gyn,* 1953 to present. St. Patrick's Hospital Library: *N Engl J Med,* 1947 to present; *JAMA,* 1960 to present; *Am Jrnl Ob & Gyn,* 1969 to present.

I

In July, 1987 plaintiff became pregnant. Upon the insistence of the baby's father she had an abortion at defendant BLUE MOUNTAIN. That prior to said abortion neither the "counselor" nor physician at BLUE MOUNTAIN told her she had a 91% risk or any risk of post traumatic stress syndrome, increased risk of breast cancer or any other physical or psychological risk as a result of the abortion.

II

After seeing the tiny parts of her baby vacuumed into a "pickle jar", she suffered depression, remorse, and guilt believing that she had killed her child and the God would never forgive her for this terrible deed. The psychic pain she suffered caused her to promise herself that under no circumstances would she ever abort another child. She was, however, able to be gainfully employed and carry out the normal tasks of life.

III

In 1989 plaintiff became pregnant. The father tested positive for HIV but she tested negative. Defendant Jan D., a counselor and nurse at CENTER, who drew and tested plaintiff's blood for HIV, told her that although she was negative nonetheless there was a 50% chance the child could be HIV positive, would probably die within two years and the plaintiff would die within a few years. Contrary to 42 USC 300 et seq. and 42 CFR 59, Jan D. in her official capacity as a representative of CENTER and Butte-Silver Bow Unified Government

strongly urged plaintiff to get an abortion. Jan D. did not tell plaintiff that a January, 1984 study indicated babies were HIV positive because of "transplacental, perinatal, or postnatal transmission"[7] which was suspected as early as April, 1983.[8] Nor did Jan D. tell plaintiff that "all infants born to HIV-seronegative mothers were negative". According to a June, 1989 report[9] available to Jan D. of 87 babies born to seropositive women 9% had AIDS, 14% were suggestive but not diagnostic of HIV infection and the remaining 75% were normal. Nor did Jan D. tell plaintiff the risk of vertical transmission has been associated with **advanced** state of the disease, a low CD4 lymphocyte cell count and increased viral burden, none of which were true of plaintiff. Nor did Jan D. tell plaintiff that as of October, 1988 AZT (zidovudine) was "beneficial in children with symptomatic HIV infection."[10] Nor did Jan D. tell plaintiff that of 308 children born of **HIV infected** mothers, one study revealed only a 27% rate of transmission.[11] Nor did Jan D. inform plaintiff of the increased risk of breast cancer, 25% risk of infection, danger of a torn uterus, possible permanent PID, 91% danger of depression or of any of the other physical and psychological risks to which the victim of abortion is exposed. That Jan D. knew, or in the exercise of reasonable care, should have known all of the above data which she refused or was unwilling to share with plaintiff. That as a consumer of family planning information and services at CENTER plaintiff was entitled to receive information reasonably available to Jan D. and Terri Doe and the other defendants and Jan D. and the other defendants had a duty to share that information with plaintiff. That a trust relationship existed between plaintiff and these defendants. Defendants had not only a high duty but an absolute duty to share this information with plaintiff. In failing to reveal this information to plaintiff defendants used wither only slight care or no care.

Because plaintiff know Jan D. and Terri Doe were health officials of Butte-Silver Bow Unified Government who held themselves out as knowledgeable about such matters, she trusted them implicitly and relied upon their advice that it was in plaintiff's best interest and even in baby's best interest to get an abortion. Jan D. and Terri Doe were so convincing and sure of their opinions as official representatives of Butte-Silver Bow Unified Government that plaintiff saw no need to consult with a medical doctor. At not time did Jan D. or Terri Doe or any other employee of CENTER or the Montana Department of Health refer plaintiff to an obstetrician or gynecologist or other physician to obtain medical advice. That the defendant Terri Doe, R.N., also an employee at CENTER urged plaintiff to get an abortion. That Jan D. or Terri Doe as an employee and agent of CENTER thereupon made an appointment for plaintiff for an abortion at BLUE MOUNTAIN.

IV

At the urging of Jan D. and Terri Doe, the CENTER counselors, plaintiff went to BLUE MOUNTAIN in Missoula to arrange for the abortion telling the counselor the father was HIV positive but the plaintiff was HIV negative.

V

When the counselor at BLUE MOUNTAIN learned the father was HIV positive, even though the plaintiff was HIV negative, she told plaintiff BLUE MOUNTAIN demanded proof in writing that plaintiff was HIV negative before BLUE MOUNTAIN would perform the abortion. After being tested twice by Jan D., who drew her blood for the HIV testing, Jan D. gave plaintiff a signed statement saying she was HIV negative which statement Jan D. knew was demanded by BLUE MOUNTAIN and plaintiff gave to the counselor at BLUE

MOUNTAIN. Neither the counselor Jane Doe nor the doctor John Roe, M.D., at BLUE MOUNTAIN told plaintiff of the risks of an abortion or that she did not need an abortion. Plaintiff alleges here as if fully set forth that defendants Jane Doe and John Roe, M.D., knew or in the exercise of reasonable care should have known all of the data on AIDS and AZT as set forth in Paragraph III above. Plaintiff further alleges that BLUE MOUNTAIN and its employees and agents had a trust relationship with plaintiff, and owed her a correspondingly absolute or highest degree of care. The BLUE MOUNTAIN employees knew plaintiff sought an abortion only because she was afraid the baby would be HIV positive, living for only two years and because she the plaintiff would only live for a short time. Yet they refused to tell her an abortion was not necessary where the mother tests negative for HIV. Neither Jan D. or Terri Doe of CENTER nor defendant BLUE MOUNTAIN employees informed plaintiff that abortion is a medical procedure with certain foreseeable physical and psychological risks including (a) retained tissue of conception; (b) damage to the cervix; (c) hemorrhage; (d) infection; (e) perforation of the uterus; (f) sterility; (g) complication of future pregnancies; (h) death; (I) posttraumatic stress disorder [also known as postabortion syndrome]; (j) severe depression; (k) anniversary syndrome; (l) sexual dysfunction; and (m) interference with personal relations. Nor did CENTER or BLUE MOUNTAIN employees tell plaintiff of the increased risk of breast cancer, or 91% risk of depression including possible suicidal tendencies or attempts, documented by the Alan Guttmacher Assoc., the former research arm of Planned Parenthood. As a proximate result of the failure and refusal of the defendants to provide plaintiff with the information set forth above which information was necessary for her to form an informed consent, she did not consent to the abortion and the defendants are guilty of an assault and battery on her person and the person of the unborn child.

VI

After delivering the signed proof she was HIV negative to the BLUE MOUNTAIN counselor on 1/20/90, BLUE MOUNTAIN'S John Roe, M.D., destroyed plaintiff's unborn baby.

VII

During and after the abortion plaintiff hemorrhaged. She was bleeding when BLUE MOUNTAIN discharged her immediately after the abortion to her home in Butte. Two days later as she continued to bleed, she began to pass blood clots about five (5) inches in diameter in her Butte apartment. In a state of panic because she though she might bleed to death she called the Missoula abortuary. The counselor who answered the phone told plaintiff the bleeding "should stop within a few days" and called in a prescription for methergine to a Butte pharmacy. This BLUE MOUNTAIN counselor did not allow plaintiff to talk to an Ob-Gyn or any other medical doctor about her bleeding and her blood clots, nor did she recommend plaintiff see a medical doctor.

VIII

On January 24, 1990 - 4 days later - at about 1 P.M., bent over with pain and hemorrhaging, plaintiff's mother drove her to the Emergency Room at St. James Hospital, Butte where the "initial assessment" on the ER form read "Blue Mtn Women's Clinic 1/20/90 vag bleeding after abortion with lg clots - pelvic cramping - **color pale".** Her complaints were recorded as "continued cramps + can't stand any more has bled since Abr - today with clots (illegible) & long ones". The examining physician, Dr. H., told her he would recommend a D & C for her but said "this is a Catholic hospital". He discharged her to her home and told her that if her bleeding got worse she should go back to BLUE MOUNTAIN the following day.

Dr. H. prescribed Tylenol 3 for pain, sent her home and instructed her "Return to Missoula tomorrow if still with problem - watch for (increased) bleeding, fever".

IX

As the day went on she continued to hemorrhage. Afraid she would bleed to death and in a panic condition at 2252 hours that night plaintiff had her mother drive her back to St. James Hospital. The emergency room "initial assessment" indicates she had a fever of 99.2 degrees and that she told the nurse she was

> "continuing to pass clots (the nurse saw these clots) and increased cramping. Called Clinic in Missoula - has appt tomorrow for follow-up & ? D&C. Bleeding 'probably 2 pads' used since left ER at 1500."

Plaintiff was using towels rather than sanitary napkins for the bleeding. BLUE MOUNTAIN in the exercise of reasonable care should have performed or at least recommended that an Ob-Gyn or skilled family practitioner perform a D&C.

X

At 12:30 A.M. Dr. H. called "721-1646 Blue Mtn Clinic (illegible) called nurse to call me back". Dr. H. again instructed plaintiff to return to BLUE MOUNTAIN for follow-up treatment and at 1 A.M. on 1/25/90 discharged plaintiff to her

> "Home Rx Pad count (illegible) return (if) fever/ (or) increased pain/ (or) increased bleed check temp before each pain pill dose continue methergine".

Plaintiff alleges that all during 1/24/90 and 1/25/90 she continued to hemorrhage.

XI

Because she was still in severe pain and hemorrhaging, on 1/25/90 plaintiff's mother drove her to Missoula to be examined at BLUE MOUNTAIN. Counselor Jane Doe had plaintiff lie on a table, apparently looked at her bottom and then told her her condition was "normal - it will go away". A medical doctor did not examine her at BLUE MOUNTAIN. The counselor then went to the reception area, picked up a prescription for methergine and gave it to plaintiff's mother who had the prescription for methergine filled at a Missoula pharmacy. At no time did plaintiff talk to a licensed physician at BLUE MOUNTAIN, nor did BLUE MOUNTAIN furnish plaintiff with any other medical help.

As is more fully set forth *supra* defendants violated the foregoing federal statutes and regulations and state statutes, which violates constituted negligence *per se,* and which negligence was a proximate cause of the damages sustained by plaintiff as hereinafter enumerated. That defendants Director of HEALTH and Medical Director of HEALTH failed to supervise CENTER as they were required to do by law and under the contract HEALTH had with CENTER, and their negligence was a proximate cause of the injuries sustained by plaintiff. That the public policy of Butte-Silver Bow Unified Government is not only to recommend but also arrange for abortions for its patient/clients, and that such public policy violates both state and federal law and regulations, violated plaintiff's civil rights and was a proximate cause of the permanent injuries sustained by plaintiff.

DAMAGES

XII

As a proximate result of the unnecessary abortion encouraged by CENTER and BLUE MOUNTAIN, and the failure of HEALTH, Director of HEALTH and Medical Director of HEALTH to properly supervise and police CENTER and BLUE MOUNTAIN, plaintiff felt she was the murderer of her baby, the world's "biggest loser" and had a low self-image, in part because of the way she was treated by the employees at BLUE MOUNTAIN. In 1990 after the abortion she began treatment with a counselor. Her counseling sessions cost $75 a month. Plaintiff has become dependent upon anti-depressants, which upon information and belief she alleges she will have to take for the rest of her life. Prozac costs about $115 a month while Klonopin (1 mg) costs about $50 a month. She has also been prescribed zoloft and amitriptyline.

Upon being told in late 1989 by defendant Jan D. that she and the baby had a 50% chance of dying from AIDS, plaintiff became seriously mentally ill within the meaning of 27-2-401, MCA. This illness got so severe that in March, 1990, plaintiff's mother put her in the stress unit at St. James Hospital East in Butte for some eighteen days where she had re-occurring nightmares. She would have stayed there longer, but Medicaid was unable to pay for any further treatment. As her condition deteriorated over the next three years, her counselor referred her to a physician for medication. Plaintiff continued to see the counselor but felt badly because she could not make payments on her bill and was ineligible for insurance.

In January, 1995 she tried going without anti-depressants. She went into a very severe and deep depression. She contemplated suicide by either over dosing on large quantities of anti-depressants and dying in her yard or

turning the car motor on in her garage. By the end of a month without medication she became severely depressed and suicidal, one night calling her counselor at 4 A.M.

XIII

Because of her anxiety and mental condition she is ineligible for insurance.

XIV

Plaintiff was able to earn $8.50 an hour until November 1989 constructing airplane wings for Boeing 757's at Heath Techno-Aerospace in Kent, Washington. As a proximate result of the foregoing failure of al of the defendants to use slight care or any care in their relations with the plaintiff, and as a proximate result of the breach of the trust relationship between all of the defendants and the plaintiff, she (I) now suffers from claustrophobia and agoraphobia which narrow her otherwise available job market, (ii) is required to spend about $200 a month for medication and $200 a month for counseling, and (iii) is prevented from enjoying an established course of life. She cannot take a shower or use a bathroom without the door being open because she believes she would suffocate. She often has a panic attack if someone else drives a car. Often she is afraid to leave her house. On 2/3/95 Dr. Richard Moore wrote she has suffered from anxiety and depression since he began treating her on 11/8/93.

XV

On information and belief she alleges her mental condition to be permanent; that she will be dependent on anti-depressants for the rest of her life; that her life expectancy according to the National Center for Health Statistics of the U.S. Public Health Service is 53.1 years, and her working life expectancy is 26.8 years.

XVI

That she was not aware that she had a cause of action against each of the above named defendants until March, 1995, when she learned for the first time that an HIV negative mother cannot give birth to an HIV positive baby.

****

COMES NOW the plaintiff as personal representative of the estate of Baby Boy Doe and for her Second Cause of Action alleges and prays as follows:

I. JURISDICTION

In addition to the statutes listed in the First Cause of Action the Court has jurisdiction because of 41-1-103, 27-1-512 and 50-15-101(1), MCA and *Strzelczyk v. Jett,* 264 Mont 153, 870 P. 2d 730.

II.

Re-alleges as if fully set forth at this point all of the allegations contained in her First Cause of Action.

III.

At the time of his death Baby Boy Doe was a "person" and had a life expectancy of 71.3 years.

IV.

Alleges that by reason of the foregoing if her intestate had not had his civil rights violated by being killed by BLUE MOUNTAINS's employee John Roe, M.D. acting in the course and scope of his employment with BLUE MOUNTAIN, he would be alive today, free of HIV infection. That as a proximate result of the breach of trust all defendants owed to the decedent and the gross negligence of all of the defendants including their failure and refusal to tell plaintiff Blackburn that because she was HIV negative Baby Boy Doe could not be HIV positive, plaintiff Blackburn as personal representative of Baby Boy Doe did not give informed consent to BLUE MOUNTAIN or John Roe, M.D., to kill Baby Boy Doe without due process of law, depriving him of life.

WHEREFORE, she prays the Court:

1. Grant judgment in favor of the plaintiff against each of the defendants jointly and severally on both causes of action;

2. Award her special, general and punitive (where allowed by law) damages on both Causes of Action against the defendants jointly and severally as set forth in the Statement of Damages;

3. Enjoin BLUE MOUNTAIN, CENTER and HEALTH from recommending or performing any future abortions until they have informed all future patients if they are HIV negative they do not need an abortion; that if the mothers are HIV positive these defendants tell them about the value of ATZ and that their babies have an up to 75% (or higher) chance of being HIV negative, and further inform these patients of the 50% increased risk of breast cancer, 25% risk of pelvic infection, 91% risk of depression, and the other risks to be proven at the trial of this action and order BLUE MOUNTAIN to retain written

proof that it has conformed with the injunction for a period of no less than ten (10) years for each patient it aborts; and that HEALTH be directed to inform all other Title X recipients in Montana about these requirements and HEALTH be further mandated to enforce these measures.

4. Grant her such further relief as appears just in the premises.

DATED at Butte, Montana this 29th day of December, 1995

Robert C. Kelleher
33 W. Park St.
Box 397
Butte, MT 59703

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 29th day of December, 1995, I caused a true and accurate copy of the foregoing FIRST AMENDED COMPLAINT to be mailed, postage prepaid, to the following:

Thomas G. Bowe, Esq.
Agency Legal Services Bureau
Justice Building
P.O. Box 201401
Helena, MT 59620-1401

Cynthia K. Smith, Esq.
Cederberg, Shott & Smith
P.O. Box 8234
Missoula, MT 59807-8234

Robert M. McCarthy, Esq.

County Attorney
Butte-Silver Bow Courthouse
155 W. Granite
Butte, MT 59701

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[1] Whether Butte Family Planning nurses were negligent or even reckless is a jury questions. Whether they should have known it was impossible for an HIV negative mother to have an HIV negative baby is a jury question. Whether the abortionist at Blue Mountain in Missoula knew, or in the exercise of reasonable care should have known, it was impossible for the baby to be HIV negative is a jury question.

[2] Montana Medical Malpractice statute which concludes: "However, this time limitation shall be tolled for any period during which there has been a failure to disclose any act, error, or omission upon which such action is based and which is known to the defendant (replaced with "plaintiff" by SB 7, 1995 Legislative Assembly) or through the use of reasonable diligence subsequent to said act, error or omission would have been known to him."

[3] Title X of Public Health Service Act (42 USC 300-300a-41) which provides in relevant part that "[n] one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." In 1988 the Secretary promulgated new regulations (42 CFR 59.2, 59.8, 59.9 and 59.10), which specified that projects receiving Title X funds (1) may not provide counseling concerning the use of abortion, or referral for abortion, as a method of family planning; (2) may not engage in activities that encourage, promote, or advocate abortion as a method of family planning, and (3) must be organized so that they are physically and financially separate from abortuaries. Found valid under First and Fifth Amendments in *Rust v. Sullivan*, 114 L Ed. 2d 233, 5/23/91.

[4] Section I(A) reads: "From July 1, 1989 through June 30, 1990, Local Provider (CENTER) shall perform the following services: (1) Carry out all administrative and supervisory responsibilities, and provide fiscal management for, the operation of a family planning services program *consistent with*: (a) ...Title X... 43 USC Section 300 et seq. (b) ...42 CFR Part 59, ... (c) Montana State family Planning Program Administrative Policies and Procedures Manual, 1988 edition, and Medical Standards Policies and Procedures Manual, June, 1985 edition ... (d) The Local Provider's family planning services grant proposal and budget as approved by DHES, dated

William Gianoulias, Esq.
Chief Defense Counsel
Risk Management and Tort Defense Division
P.O. Box 200124
Helena, MT 59620-0124

July 1, 1989, ... [NOTE: No change in scope, direction, type of service delivery, training, staffing pattern, or other significant program areas may be made unless DHES has given its prior approval in writing.] (emph supp)

[5] Formerly Department of Health & Environmental Sciences.
[6] These "facilities" not within MT Medical Legal Panel Rule of Procedure 1(d).
[7] New Eng J Med, Vol. 310, p. 81 (Jan. 12, 1984)
[8] New Eng J Med, 308:842
[9] New Eng J Med, 320:1650 (18 infants followed for 15 months and 47 for less than 15 months)
[10] New Eng J Med, 319:891
[11] Blanche et al *A Prospective Study of Infants Born to Women Seropositive for Human Immunodeficiency Virus Type 1*,320 New Eng. J. Med. 1643 (1989) (308 children of HIV-infected mothers observed; 27% rate of transmission)

European collaborative study, children born to women with HIV-1 infection: natural history and risk of transmission, 33 *Lancet* 253 (1991) (600 children born to HIV-infected mothers observed; less than 13% rate of transmission). [Published after events set out in Complaint.]

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 96-408

AMY BLACKBURN, individually and as Personal Representative of The Estate of Baby Boy Doe, Deceased,

Plaintiffs and Appellants,

v.

BLUE MOUNTAIN WOMEN'S CLINIC, INC., et al.,

Defendants and Respondents

F I L E D

Jan 15, 1998
Ed Smith
Clerk of the Supreme Court
State of Montana
S E A L

O R D E R

Appellant's petition for rehearing filed with this Court on December 29, 1997 is DENIED.

The Clerk of Court is directed to mail a true and correct coy of this order to all parties of record.

DATED this 15th day of January 1998.

Chief Justice J.A. Turnage
Justice Jim Regnier
Justice James C. Nelson
Justice William E. Hunt, Sr.
Justice Terry N. Trieweiler
Justice Karla M. Gray
Justice W. William Leaphart

APPENDIX E

MONTANA SECOND JUDICIAL DISTRICT
SILVER BOW COUNTY

****

Amy BLACKBURN, Individually and
As Personal Representative of the
Estate of Baby Boy Doe, deceased,

Plaintiffs,

vs.

BLUE MOUNTAIN WOMEN'S CLINIC;
Et al.,

Defendants

Cause No. 95-C-506

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants Dr. Sidney Pratt, Blue Mountain Clinic, Inc., Department of Public Health and Human Services, Butte-Silver Bow County Health Department, and Jan Cossel, requests (sic) this Court dismiss Plaintiffs' first amended complaint. All parties fully briefed the issues and the Court held oral argument on April 25, 1996. The Court being fully advised issues the following:

****

ORDER

****

Defendants' Dr. Sidney Pratt, Blue Mountain Clinic, Inc., Department of Public Health and Human Services, Butte-Silver Bow County Health Department, and Jan Cossel Motions to Dismiss are Granted. Therefore Plaintiff's amended complaint is dismissed with prejudice for the reasons state in the Memorandum below.

DATED this 12th day of June 1996.

/s/ James E Purcell, District Judge

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MEMORANDUM

****

I. FACTS

In July 1987 Plaintiff, Amy Blackburn, hereafter Mrs. Blackburn, became pregnant. She ended the pregnancy at Defendant Blue Mountain Clinic, hereafter Blue Mountain, Before the abortion Mrs. Blackburn alleges Blue Mountain failed to inform her of the risk associated with the abortion.

Again in 1989 Mrs. Blackburn became pregnant. The father of the fetus tested positive for HIV; however, Mrs. Blackburn tested negative. Mrs. Blackburn alleges that employees at Defendant, Butte-Silver Bow County Health Department, hereafter BSB Health Department, informed her that there was a 50% chance that the unborn baby would contract HIV and would dire in two years. Employees of BSB Health Department did not refer Mrs. Blackburn to a medical doctor. BSB Health Department then made an appointment for Mrs. Blackburn at Blue Mountain.

When Blue Mountain learned the father of the fetus tested positive for HIV, Blue Mountain required written proof that Mrs. Blackburn was HIV negative before Blue Mountain would perform the abortion. Mrs. Blackburn alleges that the employees of Blue Mountain did not inform her of the effects of HIV on thee unborn baby and that an abortion was not necessary when the mother tests negative for HIV. Mrs. Blackburn alleges that if she received the information regarding the physical effects of an abortion on her and the fetus's chances of contracting HIV she would not have consented to the abortion. On January 20, 12990 Mrs. Blackburn received a second abortion at Blue Mountain.

After the abortion in 1990 Mrs. Blackburn began seeing a counselor to help her in dealing with her depression. Mrs. Blackburn's counselor recommended she see a medical doctor

who prescribed anti-depressants for Mrs. Blackburn's depression.

In march of 1995 Mrs. Blackburn learned that an HIV positive mother could not give birth to an HIV negative child. At this time Mrs. Blackburn learned she had a cause of action and filed the complaint on November 29, 1995. In the complaint, Mrs. Blackburn alleges that all defendants acted negligently, committed medical malpractice and violated Mrs. Blackburn civil rights pursuant to 42 U.S.C. 1983. Defendants all filed Motions to Dismiss the complaint arguing that the statute of limitations has run on all of Mrs. Blackburn's claims and that the claim pursuant to §1983 fails as matter of law. Mrs. Blackburn then filed her amended complaint.

II. STANDARD OF REVIEW

When considering a motion to dismiss the court must consider all the allegations in the complaint as true and construed in a light most favorable to the plaintiff. Goodman Reality, Inc. v. Monson,267 Mont. 228, 231 883 P.2d 121, 123 (1994). The Court can only dismiss the complaint if it appears that no set of facts entitle the plaintiff to relief. Proto v. Missoula County, 230 Mont. 353, 749 P.2d 1094, 1096 (1983).

III. DISCUSSION

In this case, all Defendants argue the Court must dismiss Mrs. Blackburn's and Baby Boy Doe's amended complaint because the statute of limitations bars Plaintiffs claims. The Defendants also argue that claims pursuant to 42 U.S.C. 1983 fail as a matter of law must be dismissed. Finally, Defendants argue that Montana does not recognize standing for an unborn fetus. The Court will address each of these issues.

A. IS MRS. BLACKBURN'S COMPLAINT BARRED BY THE STATUTE OF LIMITATIONS?

In Mrs. Blackburn's amended complaint it appears she alleges three cause of action against Defendants. Mrs. Blackburn alleges Defendants committed an assault and battery, acted negligently and committed medical malpractice. Because each of these allegations have a different statute of limitations period, they require different analysis.

1. ASSAULT AND BATTERY

Mrs. Blackburn alleges that because she did not give her informed consent to the abortion Defendants committed an assault and battery on herself and the unborn child. The statute of limitations for an assault and battery is two years. MCA 27-2-204(1995). Because the alleged assault and battery took place on January 20, 1990, and the statute of limitations is two years, Plaintiffs claims against Defendants for assault and battery is time barred and must be dismissed.

2. NEGLIGENCE

Mrs. Blackburn alleges that all Defendants acted negligently in not informing her that the unborn child could not contract HIV. Mrs. Blackburn also alleges that the Defendants acted negligently in allowing her to go on with the abortion on January 20, 1990. These alleged negligent acts cause Mrs. Blackburn's depression. In alleging negligence Mrs. Blackburn argues her cause of action accrued when she discovered her child could not have been born with HIV in March of 1995 or in the alternative until a medical doctor diagnosed her with depression in 1993. Defendants argue that Mrs. Blackburn's cause of action accrued on the date of the abortion and therefor Mrs. Blackburn's negligence claims are time barred by the statute of limitations.

A cause of action accrues when all the elements of the claim have occurred. 27-2-102(1)(a), MCA. The lack of knowledge of a claim or cause of action does not postpone the beginning of the limitation period. 227-2-102(2)(1995). The failure to understand the causal relationship between an injury

and the alleged wrongful act will not postpone the running of the statute of limitations. E.W. v. D.C.H., 231 Mont. 481, 754 P.2d 817, 820 (1998).

The limitation period does not begin to run on any claim until all the facts constituting the claim are discovered or reasonably should have been discovered in the exercise of due diligence. Id. To toll the statute of limitations in a non-malpractice negligence action there must be an affirmative act by defendant to conceal the facts from the plaintiff. HKM Assoc. v. Northwest Pipe Fittings, 272 Mont. 187, 194, 900 P.2d 302, ___(1995).

In this case, all the elements of Mrs. Blackburn's claim occurred before the abortion or shortly after the abortion. Mrs. Blackburn argues that she did not discover her cause of action until she learned that the aborted fetus could (sic) have been HIV positive. However, the lack of knowledge of a cause of action does not postpone the running of the statute of limitation. Mrs. Blackburn also argues that the elements of the claim did not occur until her diagnosis of depression in 1993. However, Mrs. Blackbur knew she was depressed shortly after the abortion when she began seeing her counselor. Finally, in this case there are no facts that suggest that any of the Defendants took steps to conceal information from Mrs. Blackburn. Therefore, since all the elements of Mrs. Blackburn negligence claims occurred when the abortion occurred, the cause of action accrued in 1990 and Mrs. Blackburn's cause of action is time barred by the three year statute of limitations.

3. Medical Malpractice

Mrs. Blackburn alleges that Defendants committed medical malpractice when they failed to inform her of the effects of an abortion on her and that the unborn child could not contract HIV. Defendants argue the malpractice statute of limitations of three years bars Mrs. Blackburn's claim.

The statute of limitations for a medical malpractice claim is three years from the date of the injury or three years after plaintiff discovers or through the use of reasonable diligence should have discovered the injury. Mont. Code Ann. 27-2-205 (1995). However, in no case may the action be brought beyond five years of the date of the injury. Id. The statute of limitations is tolled when there has been a failure to disclose any act error or omission upon which the action is based that is known to the defendant. Id. In order to toll the statute of limitations under the failure to disclose provision of 27-2-205 it is the cause of action which must be concealed by "failing to disclose the fact of injury from malpractice, by diverting the patient from discovering the malpractice that is the basis of the action." Major v. North Valley Hosp., 233 Mont. 25, 30 759 P.2d 153, 157 (1988).

In the case at bar, the date of injury occurred when Defendants performed the abortion on January 20, 1990. Mrs. Blackburn filed the complaint greater that five years after the date of the injury so the complaint must be dismissed unless the statute is tolled. However, this is not a case to toll the statute of limitations. There are no facts that Defendants attempted to conceal information from Mrs. Blackburn. Defendants did not divert Mrs. Blackburn from discovering the alleged malpractice if any. Because the statute of limitations has run and there is no reason to toll the statute of limitation, Mrs. Blackburn's medical malpractice claims are time barred and must be dismissed.

B. DO MRS. BLACKBURN'S 1983 CLAIMS FAIL AS A MATTER OF LAW?

In Mrs. Blackburn's amended complaint she alleges Defendants violated her civil rights or federal law by negligently failing to inform her about the effects of abortion and that her unborn child could not contract HIV. She also alleges Defendants violated her 14th amendment rights and she is entitled to recovery under 42 U.S.C. 1983. Defendants argue that Mrs. Blackburn's claims must be dismissed based on the

statute of limitations. Defendants also argue that Title X of the Public Health Service Act does not confer substantive rights on Mrs. Blackburn so her 1983 must fail as a matter of law. Finally, Defendants argue that 1983 only applies to persons and therefore the claim against the Department of Public Health fails as a matter of law. The Court will address each of these arguments.

1. Does the Statute of Limitations bar Mrs. Blackburn's action pursuant to 42 U.S.C. 1983?

The statute of limitations period for a cause of action pursuant to 42 U.S.C. 1983 based on personal injury is the State's statute of limitations for that action. Wilson v. Garcian, 471 U.S. 261, 85 L. Ed. 2d 25, 105 S. Ct. 1938 (1985). In this case, as stated above, Mrs. Blackburn's negligence, malpractice, and assault and battery claims are time barred by Montana's statute of limitations. Because the state bars the claims they must also fail pursuant to 42 U.S.C. 1983 and must be dismissed.

2. Does Title X of the Public Health Service Act confer substantive rights on Mrs. Blackburn?

42 U.S.C. 1983 provides a remedy for violations of substantive rights. Albright v. Oliver, 510 U.S. ___, 127 L. Ed. 2d 144, 114 S. Ct. 807 (1994). 1983 does not provide a party substantive rights. Therefore for Mrs. Blackburn's claim for violations of Title X of the Public Health Service Act to survive, Title X must provide Mrs. Blackburn substantive rights.

Mrs. Blackburn alleges that Defendants used federal funds in programs where abortions are a method of family planning in violation of 42 U.S.C. 300a-6. However, the language Mrs. Blackburn refers to in Title X of the Public Health Service Act provides for use of federal monies. The language does confer upon plaintiffs substantive rights. Further, after review of court's decisions surrounding Title X of the Public Health Service Act the Court has found no cases that provide Mrs. Blackburn the substantive rights she claims. Because Mrs.

Blackburn has not alleged a violation of her substantive rights, her claims pursuant to 42 U.S.C. 1983 fail as a matter of law.

3. Does 42 U.S.C. 1983 only apply to persons?

42 U.S.C. 1983 provides relief to plaintiffs whose constitutional o federal rights have been violated. 1983 requires that a "person" must violate those rights. The United States Supreme Court has held that neither a state nor a state agency is a person and therefore not subject to liability under 42 U.S.C. 1983. Will v. Michigan Dept of State Police, 491 U.S. 58, 105 L. Ed 2d 45, 109 S. Ct. 2304.

In the case at bar, Mrs. Blackburn has named the Montana Department of Public Health and Human Service in her amended complaint. The organization is a state agency and therefore her amended complaint fails as a matter of law and must be dismissed.

C. DOES MONTANA RECOGNIZE STANDING FOR AN UNBORN FETUS?

Mrs. Blackburn, in her amended complaint, alleges that the unborn fetus was a person and entitled to bring this cause of action against all Defendants. However, Montana has not recognized standing for a first trimester nonviable fetus. Mrs. Blackburn argues that the Montana Supreme Court recognized a cause of action for an unborn fetus in. Strzelczyk v. Jett, 264 Mont. 156, 870 P.2d 730 (1994). However, the holding in Jett was not a case discussing the constitutionality of abortion. Likewise, the case at bar is not an abortion case, but a case of negligence and the Court need not address a women's right to abortion.

IV. CONCLUSION

Taking the fact alleged in Mrs. Blackburn's amended complaint as true, no set of facts entitle (sic) her to relief. Mrs. Blackburn's tort actions are time barred by the applicable

statute of limitations. The claims pursuant to 42 U.S.C. 1983 also fail as a matter of law. Finally, Montana has not recognized a cause of action for a fetus aborted in the first trimester. For those reasons the Court must grant Defendants' motions and dismiss Plaintiffs' amended complaint with prejudice.

DATED this 12th day of June, 1996.
James E. Purcell
District Judge